

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

BALL METAL BEVERAGE CONTAINER
CORP.,

Plaintiff,

Vs.

CASE NO. 3:12-cv-33

CROWN PACKAGING TECHNOLOGY,
INC., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
MARKMAN HEARING

PRESIDING: THE HONORABLE WALTER H. RICE

DATE: October 22, 2013

APPEARANCES:

John D. Luken, Esq.
Joshua A. Lorentz, Esq.
Rachael L. Rodman, Esq.
Nicole M. Sigurdson, Esq.
On Behalf of Plaintiff

Dale M. Heist, Esq.
John F. Murphy, Esq.
Aaron B. Rabinowitz, Esq.
James H. Greer, Esq.
On Behalf of Defendant

Law Clerks: Lisa M. Woodward, Esq.
Zachary P. Farquhar, Esq.

REPORTED BY:
Debra Lynn Futrell, RMR, CRR

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1 Tuesday, October 22, 2013

2 IN THE CONFERENCE ROOM

3 9:04 a.m.

4 THE COURT: This is Ball Metal Beverage
5 Container Corporation versus Crown Packaging, et al.
6 The appearances for Ball: James Greer, Aaron
7 Rabinowitz, Joshua Lorentz, and John Luken. For Crown,
8 Rachael Rodman, Dale Heist, Nicole Sigurdson, and John
9 Murphy.

10 MR. LUKEN: Some of those were crisscrossed
11 as to who's on whose side. I ended up on Dale's side,
12 I'm pretty sure.

13 THE COURT: Can we assume the case is
14 settled then?

15 MR. LUKEN: That is a novel ADR technique.

16 THE COURT: Frees up the rest of my day. I
17 apologize. I simply was going by what's in front of me.
18 Let's handle it in this fashion. For Ball, John Luken
19 Joshua Lorentz, and Rachael Rodman. For Crown, James
20 Greer, Dale Heist, Aaron Rabinowitz, and that leaves
21 John and Nicole.

22 MR. LUKEN: Yes. John, you are with the
23 John, are you not with Ball. Nicole. With Ball.

24 MR. GREER: You have John Murphy with Crown
25 too, your Honor.

1 THE COURT: I apologize, I was going by this
2 and I should have double checked it. At any rate
3 recovering my dignity to the extent possible, we're here
4 on a claim construction matter. I understand there are
5 no witnesses. We're going by oral argument. That's
6 fine.

7 I've read the briefs. I read your
8 prehearing statement. I'm assuming, and you can correct
9 me, that the arguments this morning will be based on the
10 areas on which you have not reached agreement. Is that
11 a valid assumption?

12 MR. LUKEN: Yes, your Honor.

13 MR. HEIST: Yes, your Honor.

14 THE COURT: I am planning to start first
15 with Ball's argument unless the two of you have agreed
16 to proceed differently.

17 MR. HEIST: No, we actually agree to that.

18 THE COURT: Anything you need to tell me
19 before I go in other than who represents whom?

20 MR. LUKEN: Judge, in terms of timing, since
21 your Honor allowed half a day, we were guesstimating an
22 hour and a half each and be able to reserve 45 minutes.

23 THE COURT: Unfortunately, I have a
24 commitment at noon. If we do not finish by noon, I've
25 got some time this afternoon, if need be. See you out

1 front.

2 (Recess taken at 9:07 a.m.)

3 IN OPEN COURT

4 9:15 a.m.

5 THE COURT: We have this morning case
6 C-3-12-33, Ball Metal Beverage Container Corporation
7 versus Crown Packaging Technology, Incorporated, et al.
8 The appearances are: For Ball, John Luken, Nicole
9 Sigurdson, Joshua Lorentz, and Rachael Rodman. For
10 Crown, James Greer, Aaron Rabinowitz, John Murphy, and
11 Dale Heist.

12 We are here for a claim construction or
13 *Markman* hearing. Counsel have asked for an hour and 15
14 minutes each with the option of reserving some time for
15 reply or rebuttal. It's my understanding that the
16 arguments will zero in on those claims which have not
17 been resolved between counsel.

18 Counsel for Ball may proceed. Mr. Luken.

19 MR. LUKEN: Thank you, judge. Now we find
20 out whether my technology works, whether I can advance
21 the slide successfully.

22 So far so good. As your Honor indicated,
23 we're here to focus on the claims that are at issue and
24 the disputed claim terms that are at issue.

25 Your Honor will note that in this case,

1 unlike the past case between the parties, there are
2 many, many claims. There are 25 different asserted
3 claims in the current case.

4 On the screen, the claims that are
5 independent claims are bolded and underlined, and the
6 dependent claims are not. If we compare this to the
7 last case, the only claims that your Honor had to
8 grapple with in the last case are the claims that are in
9 red here, claim 50 and 52 of the '875 patent and claim
10 14 of the '826. 13 is the independent claim from which
11 claim 14 depends, but claim 14 is the asserted claim.

12 Your Honor, that frames a lot of the issues
13 that you are going to have to deal with in *Markman*.
14 Crown in its briefing has mentioned repeatedly that
15 there are a lot of claim terms here as if that is
16 something of our choosing.

17 In fact, the patents have the unfortunate
18 tendency to describe exactly the same structure or the
19 same process using slightly different words in different
20 claims so that in the first case, your Honor, may have
21 made it quite clear, for example, that a can end wall is
22 the part of the can end that runs from the cover hook at
23 the top to the annular reinforcing bead at the bottom
24 and that it's a single surface. Your Honor only had to
25 deal with that basically in two places that were

1 relatively similar. Claim 50 in one patent and claim 13
2 or 14 in the other.

3 Your Honor now has to grapple with the
4 claims trying to say exactly the same thing but doing it
5 as many as three, four and five different ways. So the
6 bedrock of what we're trying to urge your Honor to do is
7 to construe the same concept, the same part of the can
8 end the same, regardless of whether one claim calls it a
9 first point and the other one calls it a first location,
10 or whether one claim calls it a second point or the
11 other claim calls it a transition.

12 The second bedrock piece of what Ball is
13 urging, your Honor, is to stay true to your holdings in
14 the first case. There is a significant decision your
15 Honor made that was affirmed by the federal circuit
16 concerning a disclaimer of scope by Crown as a result of
17 statements made during prosecution.

18 Your Honor found that Crown had limited its
19 invention to a can end which is seamed such that it
20 becomes substantially cylindrical during seaming, and
21 during that process, the upper portion of the can end
22 wall is bent by ten degrees or more. That latter part
23 was dispositive in the last case. The federal circuit
24 affirmed.

25 Crown never actually disagreed with the

1 "becoming substantially cylindrical" part of that
2 holding which both means it has to not be beforehand and
3 becomes during.

4 Your Honor will see as I go through today
5 that that's a bedrock in what we're proposing, is to
6 make sure that just because there are a lot of new
7 claims that are added that try to describe the invention
8 slightly with different language, that disclaimer
9 applies across the board to every claim in these
10 patents.

11 First, your Honor, I'm not doing the
12 technology real well here. I'm going backwards. That's
13 not going to help.

14 Briefly, to highlight the differences
15 between the prior art and the invention which are going
16 to drive the constructions, particularly the disclaimer.
17 So in the prior art can ends, they all have a peripheral
18 curl, that curved part at the top of the blue, which is
19 called the cover hook in the patents.

20 They have the can end wall, which your Honor
21 recognized in the last case. It is that single surface,
22 not two walls but one wall, a single surface, that is
23 the next structure down. It has the reinforcing bead at
24 the bottom, which your Honor last time held was a
25 generally U-shaped stiffening bead. And the parties

1 have agreed in this case to your definition of the
2 annular reinforcing bead from last case. So we do
3 occasionally agree on something. Then the center panel
4 into the middle. So it's a continuous set of
5 structures, peripheral curl hook, then the can end wall,
6 and then the reenforcing bead.

7 In the prior art as Crown said repeatedly,
8 the angle of inclination of the can end wall, which is
9 angle C on this, and is the angle of the straight part
10 that goes from the curl at the top down to the
11 reinforcing bead in the bottom is under 20 degrees. The
12 specification here describes angle C in the prior art as
13 about 12 to 15, as typically about 12 to 15.

14 But the specification also describes it as
15 being larger than 12 to 15, referencing one prior art
16 reference, the Kysh reference. It describes it on the
17 top as anywhere between, as that reference, going 14 to
18 16. And in the figure on the bottom which comes from
19 the specifications discussion of a Kraske reference, it
20 describes the prior art having a can end wall of between
21 12 and 20.

22 Consistently, the specification, the file
23 history refer to the prior art as can ends in which the
24 can end wall is inclined at 20 degrees less. And
25 consistently the specification, the file history, and

1 the claims themselves define the invention's can end
2 wall as always being 20 or more. Usually 30 or more.

3 That is a line of demarcation between the
4 prior art and the invention that becomes critical when
5 we're talking about what it means to become
6 substantially cylindrical. We'll talk about that a
7 little bit more this morning.

8 So again these claims all describe either a
9 can end that is seamed in a particular way, that's the
10 '826 patent, or a method of seaming that uses a can end.
11 So they're basically mirror images of each other.

12 Your Honor construed them consistently in an
13 integrated manner last time. We would urge your Honor
14 to do it again today.

15 Now, I'm moving from the structure to the
16 seaming in the prior art. As your Honor recalls, the
17 can, which is what we've highlighted in green here, sits
18 on a lifter plate in the seamer. The can end which we
19 were looking at before blown up, but it's the blue thing
20 at the top, and it's rather small when it sits in the
21 seamer, is placed on top of the can, and there curls are
22 like flanges on the outside and they sort of rest right
23 on top of each other.

24 The chuck which your Honor spent a fair
25 amount of attention to in your *Markman* decision in the

1 prior case, is pushed down on the can end so that the
2 lifter plate and the chuck squeeze the can end and the
3 can together. They are then rotated at high speed.

4 The first seaming roll shown in this
5 diagram, on figure 1 from the patents on the left, comes
6 in and begins to bend and it sort of tucks the can end
7 and the can around each other in their curved parts.
8 Then it's pulled away, and the second seaming role comes
9 in and finishes the job. During the process, as your
10 Honor recalls, it's the upper part of the can end wall
11 that is bent inwardly by the seaming rolls.

12 In your Honor's decision in the *Markman*
13 order and in your summary judgment on non-infringement
14 that was affirmed by the federal circuit, you focused
15 exactly on how much bending, where the bending occurs.
16 So the bending here is in the upper part of the can end
17 wall.

18 This is just the prior figure, that's figure
19 2 from the patents, but it blows it up a little bit so
20 that you can see the seating of the chuck which the
21 chuck continues but the lower part of the chuck here is
22 highlighted in yellow, and it's sitting in the can end
23 wall. You can see that before seaming starts, it's not
24 touching the can end in the upper can end wall, but it
25 is seated down below.

1 Importantly, your Honor, in the first case,
2 and this is in your first summary judgment decision on
3 invalidity, although the written-description holding
4 there was reversed two to one by the federal circuit,
5 your Honor correctly recognized in that decision that in
6 the invention the drive is on the can end wall. Whereas
7 in the prior art, the drive is in the annular
8 reinforcing bead that's at the very bottom where it has
9 the D where that yellow chuck is pressing down. So when
10 we were looking before during seaming, the prior art
11 presses the chuck down in the reinforcing bead. Whereas
12 in the invention that is not the case.

13 So, when we're finished, and this is figure
14 3 from the patent, those flanges, those outer curved
15 parts of both the can end and the can have been rolled
16 together and you have a typical double seam of five
17 layers, three of which come from the can -- the can end,
18 two of which from the can itself. So that's a finished
19 double seam.

20 The invention gets to a finished double
21 seam. The finished double seam looks the same. It's
22 how you get there that is critically different. Let's
23 talk about how we get there. This is the invention of
24 Crown that your Honor last time had to convert into
25 claim constructions to be true to the file history and

1 the specification and the patent that your Honor is
2 faced with doing again.

3 First of all, unlike what we were looking at
4 before, here again, this is figure 4 from the patent,
5 and we've highlighted angle C which is throughout the
6 patent, that's the angle of the can end wall. In the
7 prior art, that was always between 12 and 20. Always
8 less than 20. Typically 12 to 15 but under 20 in the
9 prior art. It's exactly the opposite in the invention.
10 Angle C is between 20 and 60. Preferably higher. So
11 that's a major line of demarcation between what the
12 patent can cover and what the prior art could cover.

13 Crown's invention, according to Crown, uses
14 on the chuck a different kind of chuck. They talk about
15 the radically different method of seaming, your Honor
16 will recall from the file history throughout from the
17 first case. Their chuck is different in that --
18 remember the chuck we were looking at before in the
19 prior art had a single generally sloping surface.
20 Crown's invention has two walls of the chuck. It has
21 that upper wall which is numbered 33 here, which is the
22 part against which the upper can end wall is pushed in
23 by the seaming rolls. And 32 on the bottom is the lower
24 can end wall.

25 You'll recall your Honor in the first case

1 held that these two walls have to be distinct and
2 discernibly different side surfaces. Because as your
3 Honor correctly found, the chuck has two walls in the
4 invention. Whereas the can end only has one. The can
5 end is a single surface. The chuck has two.

6 What's critical is that the lower wall of
7 the chuck, 32 -- the bottom of the two distinct and
8 discernibly different side surfaces is the frustoconical
9 drive surface that your Honor recognized in the first
10 summary judgment decision of invalidity. That's where
11 the drive occurs in the invention. The invention takes
12 a much bigger can end wall and it can't just press it in
13 gently by ten degrees or less. It has to crease it at
14 that juncture that you recognized between the two chuck
15 walls and bend that can end up and around and it drives,
16 not down in the bottom of the countersink, it drives
17 right on 32, the frustoconical drive surface.

18 This is the language that your Honor
19 referenced in that decision, that in contrast to figure
20 2, the prior art, the chuck of the invention is designed
21 to drive initially on the relatively large chuck wall
22 without entering deeply into the anti-peaking bead or
23 the anti-reinforcing bead. So it doesn't drive in the
24 bottom like the prior art. It drives on the side. It
25 drives on the can end wall itself.

1 This figure, your Honor, points, you can see
2 where the juncture of the two chuck walls, which is a
3 claim term that the parties have agreed upon here, is
4 where that upper can end wall is deformed during
5 seaming. So you go from over 20, usually 45, and you
6 have to bring it all the way up to practically vertical.
7 You do that by driving on the lower chuck and bending it
8 around the juncture of the two chuck walls.

9 As your Honor pointed out in the rulings in
10 the first case, during prosecution -- and here we're
11 referring to Mr. Higham's declaration, but this is
12 repeated throughout prosecution -- Crown repeatedly said
13 when challenged by the examiners, and the examiner said,
14 well, you're claiming a can end that just has a big
15 angle. I can see that in the prior art or it would be
16 obvious from the prior art.

17 Crown repeatedly said no. What
18 distinguishes us from the prior art is our method of
19 seaming because we have this juncture. We bend
20 significantly with this two-wall chuck. We bend
21 substantially more than the prior art. But we still end
22 up with a double seam that looks the same as in the
23 prior art. We get there dramatically differently.

24 In fact, Crown specifically said that you
25 would not think of doing the angle of Kysh -- that's the

1 one I showed you earlier that was 12 to 20 degrees.
2 Crown says no, you have to bend by dramatically more
3 than that. This is the particular part -- so that the
4 metal was bent through an angle of no more than about
5 ten degrees. That's the particular part of Mr. Higham's
6 declaration that became dispositive in the first case.
7 Because your Honor said the disclaimer is you have to
8 become substantially cylindrical -- that's in the
9 *Markman* ruling -- and you have to bend by no more than
10 about ten degrees. It was undisputed in that case --
11 well, once your Honor clarified how you measure bending,
12 it was undisputed in that case, that that requirement
13 was not met.

14 This is your summary judgment order that I
15 was speaking about a second ago where you referenced Mr.
16 Higham's declaration and you hold that it is undisputed
17 that the end at issue in that case did not bend by more
18 than ten. Therefore, non-infringement of all of the
19 three or four claims that were at issue in that case.

20 So that's basically a once over, fairly
21 quickly. The briefs go into more detail. Frankly, your
22 Honor's *Markman* opinion and summary judgment decision in
23 the first case also gets into some of the same detail as
24 to the critical differences between the prior art and
25 the invention that are going to drive your Honor's

1 construction of the claim terms here.

2 Quickly going over the principles that have
3 to guide you in your claim construction -- and you do
4 hit many of these in your *Markman* decision in the first
5 case.

6 First, the meaning of term is one that would
7 be the meaning that it would have to a person of
8 ordinary skill in the art after reviewing the intrinsic
9 record at the time of the invention.

10 Your Honor, throughout the briefing, Crown
11 takes the position that "ordinary meaning" is something
12 that your Honor can just punt on and hand to the jury to
13 figure out. So there are a lot of claim terms that are
14 worded differently from one claim to another. Crown
15 proposes just leaving them as is and let the jury sort
16 out where it is. Well, it's not ordinary meaning to a
17 jury that's involved here. *Markman*, this is a question
18 of law for the Court. There's no witness here today.
19 There's no declarations of record telling you that any
20 of these terms have a particular meaning to one skilled
21 in the art after that person is familiar with the prior
22 art and the intrinsic record, the file history.

23 So "ordinary meaning" doesn't mean I can
24 find it in a dictionary. Let's just throw it to the
25 jury. They'll sort it out. That's asking for mass

1 confusion. That's asking for both sides to turn their
2 experts loose in an uncontrollably aggressive manner.
3 That's asking for things to stray from the proper
4 construction. So we're asking for clarity.

5 The second place where I think we and Crown
6 are disagreeing in the briefs, and your Honor has
7 recognized this in the first case as well, is from the
8 second quote. *Phillips* itself, the en banc decision,
9 concerning claim construction recognizes that the
10 specification is always highly relevant. It's usually
11 dispositive and it is the single best guide to the
12 meaning of the claim term. That's particularly the case
13 where here the record of what Crown discloses in the
14 patent and what it said during prosecution is so
15 singularly focused on a single set of attributes so that
16 the specification really drives the claim construction.

17 However, as your Honor recognized that the
18 prosecution history can limit. If the invention is
19 limited by statements such as Mr. Higham's declaration,
20 it's binding and it's not just binding on what was in
21 the first case. It's binding on all of the claims that
22 flow from that invention so that you can have a
23 disclaimer of claim scope.

24 Critically, because the specification
25 describes and enables the invention, you cannot have

1 claims that are of a broader scope than the invention
2 that's set forth in the specification. This gets into
3 the issue that your Honor dealt with in the invalidity
4 summary judgment motion which is still here, which is
5 where there's driving. We're going to come back to that
6 in a second.

7 Thus, it is appropriate to rely heavily on
8 the written description for the guidance as to the
9 meaning of the claims. In other words, you can't claim
10 what you didn't invent. You can't claim what isn't
11 disclosed as part of your invention in the
12 specification.

13 With that as background, let's now turn to
14 the disputed claims. What we've done here, your Honor,
15 and I'll keep coming back to this as I go through each
16 group of claims to focus on which particular one of
17 these we're talking about, but they do fall into
18 basically a handful of categories.

19 As you can see, there's a couple as to the
20 chuck, the first chuck wall and the second chuck wall.
21 There's the peripheral cover hook which is at the top as
22 we looked at before. That's the structure at the top of
23 the end. We've all agreed on the annular reinforcing
24 bead. So there's nothing pointing at the bottom end
25 because that term's not disputed. It's agreed upon.

1 The can end wall is what's in the middle.

2 There is disagreement there largely because
3 your Honor in your first decision in the first case held
4 that that can end wall has to be a single surface as
5 opposed to the two walls of the chuck. Crown is trying
6 to take that out, at least of any claim that you did not
7 construe in the first case because it wasn't asserted in
8 the first case.

9 Over on the right, you can see we point at
10 the upper portion of the can end wall and the lower
11 portion of the can end wall. Those are critical for
12 clarification because the upper part of the can end wall
13 is where the disclaimer was. That's the part that has
14 to be not substantially cylindrical before seaming,
15 becomes substantially cylindrical during seaming and
16 bend by more than ten degrees. That's in your Honor's
17 original case decision.

18 We got the point, because your Honor will
19 recall, although we did not get this far, your Honor did
20 not have to decide these points. The crux of eventually
21 at a trial, if it got that far, of infringement here is
22 whether certain angles are above or below a threshold
23 amount. Usually 30, sometimes 20 degrees. And to
24 figure those out, the trier of fact has to place a point
25 somewhere on the can end wall and another point

1 somewhere else and connect the dots and measure the
2 angle. We're all using -- learning how to use AutoCAD
3 in this case so that we can do that. But what's
4 critical is where you put those two dots. Because the
5 first dot -- you'll remember in the first case, your
6 Honor, in the summary judgment briefing when your Honor
7 had to determine the amount of bending of the upper can
8 end wall, Mr. Higham tried to move the upper point out
9 into the cover hook. He tried to pick up some of the
10 curved part in the cover hook.

11 Your Honor recognized that that's not how
12 they did it when they made their disclaimer before the
13 patent office. So your Honor said no, it needs to be
14 here. Some of what Crown is frankly complaining about
15 in the briefing is that we're asking your Honor to
16 clarify some points that were in the last decision with
17 a little more substance, a little more clarity in large
18 part because of the proliferation of claims here to make
19 sure the jury doesn't think that the first point is one
20 thing here and a different thing there when it's
21 supposed to be the same thing.

22 Unfortunately, there's actually one pair of
23 claims where they have to mean something different even
24 though they use the same word. So that's why we're
25 zeroing in a little bit more on the can end wall and on

1 the points. So while there are a number of issues your
2 Honor has to decide, they collapse into a manageable
3 group of issues which frankly track very closely to what
4 you had to do in the first case.

5 So, your Honor, there are -- as I said,
6 there are quite a few -- well, it's at least plural, the
7 number of things that we've agreed on. The rotatable
8 chuck that comes straight out of your first decision.
9 The annular reinforcing bead that comes out of your
10 first decision. The seaming panel is the curved
11 innermost portion of the cover hook. We've agreed on
12 that. The reason that comes into play is that some of
13 the claims talk about the seaming panel as being the
14 thing that's above the can end wall. Others talk about
15 the cover hook. Well, the seaming panel is the portion
16 of the cover hook that abuts the can end wall. So for
17 purposes of this case, the seaming panel and the cover
18 hook are, for all practical purposes, going to be the
19 same thing. The cover hook actually has some more
20 structure that's not relevant to the case. Because some
21 claims talk seaming panel and some claims talk cover
22 hook, they both have to be something that's addressed.
23 We agreed on the seaming panel.

24 The juncture therebetween, your Honor
25 recalls, that was a critical thing in the first case.

1 Your Honor didn't have to reach that in summary
2 judgment, but your Honor was clear that there's two
3 walls on the chuck and where they meet is a juncture
4 which is a definable edge which is a point in
5 cross-section. That's because they need that edge to
6 seam.

7 Deforming during seaming, so as to be bent
8 upwardly around the juncture of the chuck walls --
9 that's from claim 14 from the last case -- and bending,
10 et cetera, et cetera, from claim 50 from the last case.
11 We have agreed there that it's bending upwardly around
12 the juncture with a portion of the can end wall being
13 bent by more than ten degrees. On at least the claims
14 that were here from the last case, Crown has agreed the
15 disclaimer applies. Crown is trying to avoid the
16 effects of the disclaimer everywhere else.

17 So the first group of claims that I'll
18 address -- and I'm going to move through some of these
19 more quickly than others because the briefs, I think,
20 may cover them more completely than others. And the
21 points of disagreement may be clarified in the briefs,
22 but in any event the first one is the cover hook. The
23 most logical place to start because it's up at the top
24 of the entire structure. It's the outside. It's that
25 curved thing that I showed you before.

1 This shows up in most of the claims. All of
2 the independent claims. Therefore, out of the 25 claims
3 that we have at issue here, it's in quite a few.

4 The parties have proposed different
5 constructions primarily because we have more
6 clarification. Again so that the jury doesn't get
7 confused and try to draw that critical point that you
8 have to measure for some of the claims where the cover
9 hook stops and the can end wall starts, that's a point
10 that you need so that you can draw two dots, connect the
11 dots and measure the angle of the line between them, so
12 the jury and the experts need to know exactly where it
13 is so we've provided adequate details so that the jury
14 can do that.

15 How so? You note that we've said the
16 outermost curved portion of the can end wall that's
17 placed on the can body flange and it's formed into
18 double seam. And that's describing exactly what we
19 looked at a second ago when we went through the
20 invention. As I pointed out, the cover hook is the
21 thing on the outside. In claim 1 of the '826 patent
22 that upper point of the border between the cover hook
23 and the can end wall is where you have to put your first
24 point that you're going to measure an angle for. It's
25 critical that the jury in effect know where the border

1 is.

2 Again, it's not sufficient just to say,
3 well, Indiana's west of Ohio and Ohio is east of
4 Indiana. You've got to know where the border is if
5 you're going to figure out whether somebody is in one
6 state or another. It's the same kind of thing we're
7 dealing with here.

8 We've referred to, in our proposed
9 construction, the cover hook is the outermost curved
10 portion of the can end. This is right. Figure 5 shows
11 you that's exactly what it is. It's the outermost
12 portion of the can end and it's curved.

13 In the specification, the spec makes it --
14 the patent makes it abundantly clear that you place the
15 cover hook on the body of the can, on the flange of the
16 body of the can and they are rolled together during
17 seaming. When we say it's placed on the can body
18 flange, that is not an important limitation. That's the
19 invention. That's how this thing works. You can see it
20 right here. The cover hook during seaming, as it's
21 seamed, is the red part that's getting rolled in and the
22 green is the can end itself.

23 This is -- before I showed you during
24 seaming one sitting on the other. This is from figure 7
25 of the patents which is when seaming is pretty far

1 along. On the left side, I believe that's after the
2 first roll is finished. On the right side, you can see
3 the classic double hook -- or double seam on the
4 finished seam formed by the second seaming roll. So
5 this is what happens. It is formed into a double seam.
6 So our construction is describing exactly what goes on
7 in the invention.

8 Crown takes issue with some of the language
9 we have in here and says it's surplus and you don't need
10 it and it's wrong. The two parts they really disagree
11 with most are whether the cover hook is the curved
12 portion of the can end and whether it's formed into a
13 double seam. Well, it is. The best proof of that is,
14 remember during the last case Crown pointed out that it
15 wasn't just suing us here -- or Ball here, it was suing
16 Rexam in Delaware. That case proceeded to some
17 decisions by the district court and made a trip up to
18 the federal circuit as well.

19 In that case you'll recall shortly before
20 your Honor ruled on *Markman*, Crown submitted the entire
21 *Markman* decision from the Delaware case and urged your
22 Honor to adopt it verbatim because they were bound by
23 it. Your Honor pointed out that that doesn't
24 necessarily mean that Ball is bound by it.

25 But on this particular point, the fact that

1 the cover hook is curved -- is a curved portion of the
2 can end came right out of that decision and right out of
3 Crown's proposed construction and that it's formed into
4 a double seam is also right out of Crown's construction
5 in the other case.

6 Your Honor, we submit Crown should not be
7 heard here to say that "the curved portion of the can
8 end" or "formed into a double seam" are either incorrect
9 or inappropriate for inclusion in a claim order because
10 that's where they came from, their proposed construction
11 for the exact same claim term in the other case.

12 So Crown's construction is insufficient
13 because it's not precise enough. It, once again, just
14 says an outer portion. So you can't tell where that
15 portion of the end, the cover hook stops and the can end
16 wall starts. We have to be clear enough.

17 Your Honor's decision in the first case
18 describing the can end wall as a single surface and what
19 Crown asked for in the other case and got, which is the
20 cover hook is the curved thing, the border between the
21 curved outer portion and the single surface that's a
22 wall, that does the job. So this enables the jury to do
23 what it has -- the trier of fact to do what it has to
24 do.

25 The next group of terms are the ones that

1 deal with the can end. The can end wall. And so
2 everything that I showed you earlier, I'm going to zoom
3 in now and pay attention to the can end wall term. This
4 begins where the terms are not always consistent. So
5 sometimes it calls this the wall extending inwardly and
6 downwardly. Sometimes it calls it a circumferentially
7 extending wall. Sometimes it calls it a
8 circumferentially extending wall extending from the
9 seaming panel of the reinforcing bead.

10 There is absolutely no dispute in the
11 briefs. Your Honor has four briefs before you. No one
12 has suggested that the part of the end that it's
13 describing is different. The can end wall is the can
14 end wall in the invention. The cover hook is the cover
15 hook. The reinforcing bead is the reinforcing bead. So
16 these claims need to be construed consistently so that
17 the jury doesn't get confused by one or the other. And
18 in light of that, we have tried to do that. So you'll
19 see the three terms on the left and in the middle is our
20 proposed construction. In the right, Crown is proposing
21 three different versions for these three different terms
22 that mean the same thing.

23 What you'll notice is that the single
24 surface for the can end wall that your Honor found had
25 to be the case in the first case, in the first

1 litigation, in your first decision, is in ours. It
2 has -- however you're going to define the can end wall,
3 even if you're going to accept Crown's invitation to do
4 it here three different times instead of once
5 consistently, the single surface restriction that your
6 Honor found last time belongs in there.

7 And the fact that Crown pulled out yet more
8 claims than they asserted in the prior case doesn't mean
9 they get a pass and that that single surface is
10 eliminated. Their chuck still has two walls. Their can
11 end wall is a single wall. We've also added it extends
12 from the cover hook to the annular reinforcing bead. If
13 it belongs in one of these, it belongs in all of them so
14 that the jury can tell that these are describing the
15 same thing.

16 So, your Honor, in your decision in the
17 first case dealing with -- and we have fewer claims
18 here, but dealing with this structure, specifically
19 said, it's a single surface encircling the center of the
20 can from the seaming panel to the reinforcing bead.
21 Remember the seaming panel is part of the cover hook
22 that's right -- it's the innermost part of the cover
23 hook. So we've put the word "cover hook" in instead of
24 "seaming panel" so it's consistent with the asserted
25 claims here. But that doesn't change the meaning.

1 It's still what goes between the cover
2 hook/seaming panel all the way through the reinforcing
3 bead. Your Honor recognized that. That is exactly what
4 the specification shows.

5 You can see in figure 6 on the right side is
6 that single surface, straight can end wall. It's the
7 single surface that your Honor found in the red. On the
8 left side you can see where they're beginning to seam
9 with the first seaming roll, and it's starting to get
10 bent upwardly around the juncture of the two chuck
11 walls. But it's that red single surface.

12 Equally importantly, the specification
13 always describes the lower part as being the
14 frustoconical drive surface. It's what does the driving
15 during seaming.

16 In the file history, Crown was consistent.
17 The wall of the can is engaged by the chuck so we're not
18 driving in the reinforcing bead like in the prior art.
19 We're driving on the wall. The deformation of the upper
20 portion of the can end wall -- meaning how do I get from
21 this big, greater than 20, preferably 4 to 60, usually
22 45 can end wall angle, how do I get it up into a double
23 seam. I use it using the juncture between the chucks.
24 So that's what we're talking about with this can end
25 wall.

1 We talk about it being part of our
2 construction is the can end wall is engaged by the chuck
3 during seaming. Your Honor in the invalidity summary
4 judgment decision in the first case specifically
5 recognized the only embodiment support disclosed by the
6 written description here is that the chuck drives on the
7 can end wall and doesn't enter deeply into the
8 reinforcing bead. The drive of the invention is
9 unequivocally on the can end wall.

10 Crown points out in its brief that your
11 Honor's decision on the -- your Honor's decision that
12 there was a 112 violation, a written description
13 violation, was reversed two to one by the circuit. But
14 remember what your Honor decided was that the claim to
15 be valid needed a negative limitation saying don't drive
16 in the reinforcing bead. Thou shalt not drive in the
17 reinforcing bead. This was really drilled in, in oral
18 argument when one of the judges asked Mr. Heist: So you
19 don't have -- don't you have to drive outside the bead?

20 Mr. Heist responded yeah, you do, meaning
21 our invention drives on the wall. But Mr. Heist said
22 you can also drive inside the bead. That was the
23 holding in that case. Your Honor found that if we drive
24 in the reinforcing bead we get a Get-Out-Of-Jail-Free
25 card on the written description requirement. Found --

1 actually that's a really horrible way of saying it.

2 Your Honor found that the claim can't be
3 valid if it permits driving in the reinforcing bead.
4 Your Honor imposed a negative limitation that should
5 have been there and wasn't. The federal circuit said
6 they do not need to prohibit driving in the reinforcing
7 bead.

8 But as Mr. Heist is admitting right here and
9 as your Honor correctly recognized what this invention
10 is, that doesn't change the fact that you do have to
11 drive on the wall. So the can end wall is engaged by
12 the chuck during seaming. That is a central component,
13 an inescapable component of the invention here.

14 Even though the negative limitation that we
15 urged and your Honor accepted went down at the federal
16 circuit two to one, so thou cannot drive in the
17 reinforcing bead, the absence of that is not a written
18 description violation per the federal circuit. Thou
19 must drive with the chuck on the can end wall, is still
20 the proper construction here.

21 Mr. Heist has succeeded in convincing the
22 federal circuit that you can drive both places but
23 you've got to drive on the can end wall. That's what we
24 put right into the construction of the can end wall
25 because the negative limitation has been reversed so

1 let's make -- it belongs in the invention, so let's
2 describe the claims that way. That's where it belongs
3 is in the can end wall.

4 Crown has also suggested that referencing
5 the can end wall as going all the way to the annular
6 reinforcing bead is inappropriate because some claims
7 don't have a reinforcing bead. Well, all of the claims
8 that are asserted here do have a reinforcing bead.

9 And in the *Rexam* case -- as we pointed out
10 in the briefing in the first case, in the *Rexam* case,
11 the district court in Delaware held that any claim that
12 doesn't have a reinforcing bead is invalid under the
13 written description requirement because this invention
14 requires one. The fact that there are other claims that
15 are invalid that don't have a reinforcing bead does
16 nothing to change the fact that this can end wall runs
17 all the way to the annular reinforcing bead.

18 So, we've said it's a single surface from
19 the cover hook to the reinforcing bead which engages.
20 The parties have already agreed that the seaming panel
21 is the curved innermost portion of the cover hook.
22 Claim 1 doesn't require a seaming panel but it requires
23 a cover hook. That's why we talk about the cover hook,
24 as I said before.

25 Crown's proposed constructions take what is

1 supposed to be the same part of the can end and describe
2 it in different ways. They leave some of the components
3 out of some, put it in others. That's inappropriate.
4 *Edwards Liesciences* recognizes that. Most critically,
5 it fails to incorporate a single surface.

6 Crown also fails to incorporate its
7 arguments during prosecution about being engaged by a
8 chuck during seaming, as your Honor reflected in the
9 summary judgment decision on invalidity, and it acts as
10 though the reinforcing bead isn't there when it clearly
11 must be. So we would submit on this one as well our
12 construction is consistent with your Honor's previous
13 ruling and with the file history and the specification.

14 The "first point" and "first location"
15 terms. This one is a little more complicated, judge,
16 because in the last case every time they talked about
17 the first point, they were talking about a single place.
18 All the claims in the last case.

19 Here, as you can see, we pointed to two
20 different points in red here. Claim 1 of the '826
21 patent, one of the newly asserted claims, wasn't in the
22 case last time. That one talks about a first point
23 that's at the top end of the can end wall. It's the
24 border between the can end wall and the cover hook.

25 All the other claims, the first point or the

1 first location is down where it gets bent upwardly
2 around the juncture of the two chuck walls. That is
3 straight out of your decision in the last case. We're
4 asking your Honor -- in the last case your Honor didn't
5 construe, technically, the first point, the lower of the
6 two that I've got here because that's the first point
7 that was in the last case. But your Honor basically
8 said: I don't have to construe it because everybody can
9 tell that it's where the can end wall is bent upwardly
10 around the juncture of the two chucks.

11 Now, we've got, unfortunately, a claim that
12 uses the first point in a different way. So we're
13 asking your Honor for the claims that are like the last
14 case and are talking about the first point where it
15 bends, just make it part of the construction.

16 Last time you said: I don't have to do it
17 because everybody knows that's it. This time we have a
18 different first point somewhere else. So for that claim
19 we need to be specific and for the original claims we
20 need to be specific.

21 Now, I'm focusing on the ones that were in
22 the last -- okay, I'm sorry. So the first point in '826
23 claim 1 is the upper of those points I was showing you.
24 Then the first point and first location in the other
25 claims is the other one. Then this zeros in again and

1 shows you the two locations that I was just showing you
2 a second ago.

3 So let's zoom in on -- this is the first
4 point, first location from the original case. This is
5 everything except claim 1 of the '826. So it's the
6 bottom of those two points.

7 We propose to clarify. Your Honor didn't
8 put this in your technical construction, but it was in
9 the opinion. It's the point on the can end wall where
10 the juncture of the two chuck walls engages the can end
11 wall and bends it upwardly. Whereas Crown has basically
12 said it's a first point or a first location.

13 In the last case, that might have worked
14 because everybody knew what we were talking about. In
15 this case just telling the jury a first point or a first
16 location when we've got that other claim hanging out
17 there that's pointing at a different part, it needs to
18 be clarified.

19 This is the language I was talking about
20 from your first *Markman* order where you said you didn't
21 have to construe it because it's apparent that that's
22 where the can end wall is bent upwardly at the juncture
23 of the two chuck walls. So we're asking to take that
24 thing that was apparent in the first case and actually
25 make it part of your claim construction. This is

1 consistent with what Crown said during prosecution. The
2 wall's engaged by a chuck. The upper portion of the
3 wall, the juncture formed by the two walls of the chuck
4 bend the can end wall. So what your Honor put, as I
5 just showed you a second ago, in your decision is
6 exactly what Crown told the patent office, and it's what
7 the specification says.

8 So that group of claims, the first point
9 everywhere except claim 1, all we're asking you to do is
10 to make part of an actual construction what you
11 recognized in your decision last time.

12 Claim 1 of the '826, remember it's pointing
13 at the higher level. It uses the same word "first
14 point," but it's not talking about some point in the
15 middle of the can end where it gets bent by the chuck.
16 It's talking about the top of the can end where it
17 borders the cover hook. So you're moving from the
18 single surface into the curved cover hook. Here this is
19 how it's used and it's used to pick a point, pick a
20 second point, connect the dots, and measure an angle.
21 It's critical that the jury or the expert or the trier
22 of fact knows which point we're talking about and how
23 it's different from the way it's used in all the other
24 claims.

25 On this one, we define it fairly

1 straightforwardly. It's the innermost point on the end
2 at which the cover hook terminates. It's the border
3 between the cover hook and the can end wall. It's the
4 top of the can end wall. It's all saying exactly the
5 same thing. Whereas Crown just says it's a point. As
6 in, "jury, go ahead and get confused," especially
7 considering we've got that other language there.

8 Here we're showing it very specific. The
9 green is the cover hook. The blue is the can end. This
10 is where they border. So it's the innermost point.
11 Come in from the green. It's where the cover hook
12 terminates. So the jury would use your Honor's
13 construction of cover hook, use your Honor's
14 construction of end, and it can plot that point
15 adequately.

16 Crown's constructions, in contrast, provide
17 not sufficient specificity and accuracy. They treat all
18 a point, a point, a point. Your Honor will remember in
19 the last case Mr. Higham tried to plot the upper can end
20 wall as including part of the curve that's in the cover
21 hook. Your Honor held him to it; said no, it's the
22 straight part. It's not where you're going. Crown's
23 construction invites the jury to ignore all of that and
24 just basically take over your role as the decider, to
25 use an unfortunate term, of claim construction matters.

1 So now I'm moving in, so we've covered the
2 first point, which is the thing that defines the top of
3 the angle that we're measuring. Now, I'm going to move
4 down into the second point. What defines the bottom.

5 Here you can see it, and it's fairly
6 consistent throughout. There are no claims to throw a
7 monkey wrench into it here and make a second point
8 different in one claim than it is in another.

9 The problem here is that between all these
10 25 claims, sometimes it's a second point, sometimes it's
11 a second location, sometimes it's a transition, but it's
12 always talking about the same thing. It's that point
13 where the can end wall, which is that single surface
14 that comes down, goes into the U. That's the
15 reinforcing bead. Every embodiment, everything the
16 patent teaches us is where that kink is that we're
17 pointing at.

18 If you look at page 8 and 9 of Crown's
19 opening brief in this very *Markman* process and you look
20 under the section called Crown's Invention, you're going
21 to see that they point the second point and the
22 transition to exactly that kink. So what we're trying
23 to do here, your Honor, your Honor needs to be able to
24 tell the jury where that kink is, find that spot where
25 it changes shape. As I said, depending on which claim

1 you're in, the claims describe exactly the same thing
2 with a multiplicity of ways.

3 Your Honor, we submit that using a single
4 consistent construction to describe the same thing is
5 the most effective way to make sure that the jury and
6 the trier of fact know what they're doing and doesn't
7 invite confusion, motions, et cetera, et cetera.
8 Therefore, for these various points, we've said it's the
9 point in the can end which is angularly offset. That's
10 the kink. I'm going to come back to where we got that
11 language from.

12 Crown, in two of the five, uses the language
13 in your first case, it's a point that marks the lower
14 end of the can end wall. It's a place where one thing
15 changes to another.

16 On this one, your Honor, I confess we are
17 asking you to be -- to clarify beyond what you did in
18 the last case. There are a number of terms here that
19 all have to mean the same thing. We're asking your
20 Honor to avoid the problems that surfaced in the last
21 case by staying true to what you're describing but use
22 more words.

23 So it's that point right there where the
24 part above it is the can end wall, that single side
25 surface. The part below it we've all agreed is a

1 U-shaped reinforcing bead. So we're trying to describe
2 the border. This is a little hard to see.

3 In the first case, your Honor, this was in
4 the summary judgment briefing on validity, I asked Mr.
5 Higham, Crown's expert, to tell me where this second
6 point, second location transition was. Tell me where
7 the top of the reinforcing bead is and the bottom of the
8 can end wall is. It wasn't even on the accused device.
9 It was on the invention.

10 Figure 4 of the patent. He drew three
11 different reinforcing beads. In effect, it's kind of
12 hard to see, your Honor, but right on the bottom of the
13 can end wall on the very top, he split the can end wall.
14 That straight line coming down, part of it he put in the
15 reinforcing bead. Part of it he put in the can end
16 wall. That's exactly the inconsistency and the
17 potential for, frankly, mischief that is there unless
18 the Court takes it a step beyond what you did in the
19 last case.

20 In the last case you basically said that
21 this point is where the can end wall stops and the
22 reinforcing bead stops -- or starts. It's the border.
23 Now we're asking you to give the jury some, if you will,
24 geometry, some way to figure out where that change of
25 shape is because you're undeniably -- under your Court's

1 original decision in the prior case, you're going from
2 one surface has a single surface. It's not bending back
3 and forth all the way all over the place. The next
4 structure, the reinforcing bead, is a U. You ought to
5 be able to tell when you've moved from a relatively
6 straight thing into a U-shaped thing. That's what we're
7 asking you to do.

8 So the language that we picked and -- is
9 from the Crown patent, a continuation patent, the '041
10 patent that has been prosecuted and issued since your
11 *Markman* decision in the first case. This is the patent.

12 In that prosecution the patent office
13 basically challenged Crown and said: Well, we've got a
14 lot of prior art that we think reads on what you're
15 doing. And Crown specifically amended and said no, our
16 invention is that the outer wall, this U in the
17 reinforcing bead is angularly offset from the chuck
18 wall, which is to say the can end wall. We've got an
19 angular offset.

20 Your Honor, that exactly describes what's
21 going on here. I recognize this is from a later patent,
22 but what we're asking your Honor to do is to give that
23 clarity. How does a jury know where that border is?
24 The border happens when the shape changes. An angular
25 offset is precisely what's going on in this patent.

1 That's why we went to that patent.

2 Similarly, in this patent -- Crown says in
3 the reply brief: Well, that's going to be really hard
4 to figure out. How can you tell what an angular offset
5 is? First of all, you can look at figures 4 through 7
6 because it's quite clear where that angular offset is.
7 If you notice, your Honor, the can end wall is always 20
8 to 60 degrees that I was showing you and talking about
9 earlier. This is in the specification itself.

10 The other thing that's on the other side of
11 this border is the reinforcing bead. Crown's
12 specification says that varies between minus 15 to plus
13 15 degrees. You can have a variance from 60 to 10, 60
14 to 10, 60 to minus 15. The closest these can get is a
15 20-degree can end wall and a 15-degree chuck wall.

16 So even if you've got a U-shaped thing at 15
17 degrees and you've got 20 degrees coming down, there's a
18 kink. There's an angular offset. That enables the jury
19 to find that point which it unequivocally has to in
20 order to connect the dots and measure an angle so the
21 jury can do what it's supposed to be doing without --
22 the problem we had with Crown's expert saying, well, I
23 can find four or five or six or an infinite number of
24 reinforcing beads. There's only one angle that has to
25 be measured. So we can't have an infinite number of

1 borders that is going to be the bottom anchor for that
2 angle.

3 Right there again if I flip back to figure
4 4, all we're trying to do is describe that kink. An
5 angular offset is how Crown described it in a subsequent
6 patent that has the same specification and the same
7 invention. So if your Honor were inclined to use a
8 thesaurus and come up with a different word for angular
9 offset like a kink or something like that, but it's the
10 change in shape. An angular offset is the appropriate
11 way to do that.

12 Crown, on the other hand, its constructions
13 are all over the place. They have five different
14 constructions for the same thing. Most of them don't
15 include the important parts that come right out of the
16 specification and right out of what you said in the
17 first case. That's the "second point," "second
18 location," terms that are down at the bottom.

19 It also skips -- it's perfectly appropriate
20 under *Microsoft* and *Verizon* to be advised in this case
21 by what Crown did in a subsequent patent that flows from
22 the exact same application.

23 Now, your Honor, I'm going to revisit the
24 can end wall terms quickly. We're going to look --
25 because now it's important, as I said before, to be

1 clear about what's different between the upper and the
2 lower portion of the can end wall. So I'm focusing on
3 the upper portion. That's the part that had to be bent
4 by more than ten degrees. That was the decision and
5 that was the driver in your first summary judgment
6 decision.

7 Again, we've got the problem that,
8 describing the very same thing, the claims don't always
9 use the same words. The way to make this clear to the
10 jury is to use the same construction for each rather
11 than a bunch of vague constructions that the jury could
12 think these are different things. So that's what we've
13 proposed.

14 Your Honor's summary judgment decision
15 noted that this upper portion of the can end wall
16 becomes substantially cylindrical during seaming. Your
17 Honor, that's critical, not only does it have to end up
18 being substantially cylindrical, but it has to become
19 substantially cylindrical during seaming which means it
20 wasn't substantially cylindrical before seaming.

21 That's where we come -- that's why we add to
22 this construction that the can end wall before seaming
23 is not substantially cylindrical; that it has an angle
24 of at least 20 degrees. I'm harkening back here when we
25 were going through the invention and the prior art, your

1 Honor will recall, that that can end wall, and
2 particularly the upper can end wall, is always described
3 as 20 degrees or below in the prior art and always
4 described as 20 degrees or above in the invention. So
5 if you're not at least 20 degrees before seaming, you're
6 in the prior art, you're not in the invention. So this
7 "becomes substantially cylindrical" language that your
8 Honor used in the *Markman* decision and in the summary
9 judgment infringement decision, this 20 degrees simply
10 enforces that. It clarifies that again so the jury
11 knows what it means to become substantially cylindrical.
12 I'm at a risk of running late on time.

13 Your Honor, during the appeal when you were
14 affirmed on the summary judgment of non-infringement
15 decision, Crown disagreed strongly with the ten-degree
16 requirement, the bending of more than ten degrees that
17 you read into. The federal circuit affirmed on that.

18 What Crown never disagreed with before your
19 Honor or on the federal circuit was the "to become
20 substantially cylindrical." Crown admitted -- in fact,
21 Crown said we didn't go as far as ten degrees. We just
22 said it has to become substantially cylindrical. So
23 becoming substantially cylindrical, there's no doubt
24 about that. It was in your decisions twice, and Crown
25 on appeal when it unsuccessfully tried to get the

1 ten-degree part of the disclaimer reversed, Crown kept
2 and didn't even challenge the "become substantially
3 cylindrical." Here "to become substantially
4 cylindrical," you have to be not substantially
5 cylindrical to start with and that line is 20 degrees
6 because that's the line between what they describe as
7 the prior art and what they describe as the invention.

8 I'm just showing you here that angle C is
9 not substantially cylindrical because it's between 20
10 and 60 in the invention right out of the specification.

11 As an aside, your Honor, the specification
12 is almost identical. All the way through our briefs and
13 all the way through this presentation, we're always
14 citing the '875. For some reason, even though the words
15 are almost always exactly the same and the figures are,
16 the lines get off a little bit. When you're reviewing
17 any of this, we're always citing the '875. If it looks
18 like what we said isn't there because you're looking at
19 '826, it's probably right next to it.

20 The other issue Crown has is that our
21 construction of the upper can end wall talked about a
22 straight upper portion of the upper can end wall. Your
23 Honor recalls that during the non-infringement briefing
24 on the issue that you decided, not the ones that were
25 moot because you didn't need to reach them, Mr. Higham,

1 you'll recall, we measured -- our expert measured the
2 bending of the upper can end wall as being the straight
3 part because that's exactly what Crown did when it was
4 describing how much the upper can end wall bent during
5 prosecution. That was their disclaimer.

6 Remember Mr. Higham was faced with 13. He
7 needed that number to be higher. He made it 23 because
8 he moved the point from the top of the point of the
9 straight upper can end wall and he went up that curve
10 into the cover hook. He moved it all the way over here
11 and that took his angle, surprisingly, 13 to 23. Your
12 Honor had none of that.

13 That's exactly what we're fighting over
14 here. We're fighting over whether the upper can end
15 wall is what your Honor said it was in the first case or
16 whether Crown can continue to include part of that
17 curved thing next to it.

18 What we're proposing here is not only
19 straight out of that summary judgment decision, but it's
20 entirely consistent with your *Markman* decision where you
21 said the can end wall is like a single surface like one
22 shape. The cover hook, remember, is the curved thing
23 next to it. So that's how the jury tells the
24 difference.

25 Crown's proposal leads to inconsistent

1 measurement decisions which your Honor had none of in
2 the first case and we submit you don't want to invite in
3 the second case. Crown's proposal does not always
4 incorporate the disclaimer that your Honor found in the
5 first case and has been affirmed.

6 Flip now to the lower portion of the can end
7 wall. That's the part that we've highlighted in red
8 here. This shows up in a couple of different places.
9 It's the second portion, it's second wall portion, but
10 we're talking about the same thing. So again, we need
11 to use one definition. Here Crown actually only uses
12 one. But again, it's too vague. It simply says a
13 second part. It invites the jury to go all over the
14 place. What the specification clearly says, what they
15 said throughout prosecution, what's consistent with your
16 invalidity summary judgment decision, this is the lower
17 part. This is what's engaged by the lower wall of the
18 chuck, the frustoconical drive surface.

19 Here I'm showing you again figure 6 with
20 particular attention to this part of the can end wall,
21 the lower part of the can end wall. Your construction
22 should reflect that it's engaged by the frustoconical
23 drive surface during seaming. That's, 32 is that lower
24 wall on the chuck. In red is the lower part of the can
25 end wall. So driving has to go there.

1 Again on appeal Mr. Heist convinced the
2 federal circuit that you can also drive down in the
3 reinforcing bead so that negative limitation I know that
4 basis for invalidity, we can't get back. But the fact
5 is, the invention drives on the can end wall on the
6 lower part of the can end wall and, your Honor, that
7 needs to stay and be clear. That's what Mr. Higham told
8 the patent office that the way you can make this large
9 angle work is you reform by driving down here and
10 bending up here. So you take that single surface can
11 end and you do this with it because you got a two-wall
12 chuck. But you're driving down here. When I said do
13 this, you're driving here. That needs to be in the
14 construction of the lower part of the can end wall.
15 Also your Honor recognized that the only embodiment
16 supported or disclosed by the written description is the
17 chuck drives on the can end wall. That flows directly
18 from your decision and from the patent.

19 Crown, on the other hand, shortcuts this by
20 being sufficiently vague that it's going to create
21 problems because again the lower can end wall and the
22 reinforcing bead you need to know where those border so
23 that you can draw the point. Then you can connect the
24 dots and you can measure the angle. Once again, your
25 Honor, because of the proliferation of claims and other

1 reasons in this case, we're just asking you to clarify
2 what you said in the first case but in a manner that is
3 consistent -- entirely consistent and flows from all of
4 your decisions in the first case.

5 Your Honor, I'm down to two groups of terms.
6 The chuck has a first wall and a second wall. Again
7 you're familiar with this. Those are the two walls of
8 the chuck that you decided in the first case need to be
9 distinct and discernibly different surfaces. The
10 language -- some of the claims talk about a first and
11 second wall. Then some of them call out the first wall.
12 Some of them call out the second wall.

13 So, your Honor, we've submitted that they,
14 first, all need to be distinct and discernibly
15 different. Your Honor recognized that the one chuck
16 wall and the other chuck wall are distinct, discrete and
17 discernibly different so we put that in all of the
18 definitions here. Crown has taken that out. So Crown
19 has eliminated that consistently that the can end wall
20 is a single surface. One wall before seaming. The
21 chuck is two walls, discrete and discernibly different
22 surfaces from your first decision. We're asking you to
23 keep it and to make it clear where we've got additional
24 claim terms that only talk about part of the wall, okay,
25 incorporate it into your description of those claim

1 terms. So that's what we're doing here.

2 So you said in your first *Markman* decision
3 that you would inform the jury that the first and second
4 walls of the chuck means discrete -- distinct, discrete
5 and discernibly different side surfaces. That remains
6 critical. Crown offers no reason to go back on that.
7 Your Honor should keep it.

8 That's the upper wall, the first one. Your
9 Honor since the claims are sometimes using both together
10 and sometimes use them separately, when it uses them
11 separately, let's make it clear, we submit, your Honor,
12 to the jury which one we're talking about.

13 The first wall, 33, is described as
14 substantially cylindrical. It has to be substantially
15 cylindrical during seaming. That's what you press the
16 can and the end together against to get the double seam.
17 The double seam has to be substantially cylindrical
18 because that's how a pop can looks. That's how a beer
19 can looks. That's what the specification describes.
20 It's up and down when you're finished.

21 The top part, 33, which is your first wall,
22 is a substantially cylindrical surface that comes
23 straight out of the specification. That's how this
24 works.

25 The second wall is a frustoconical drive

1 surface. We talked about that earlier when we were
2 talking about the can end wall. Your first summary
3 judgment opinion, again bedrock interpretation in this
4 case, is that this invention requires that the chuck
5 drives on the can end wall. Here's where it happens.
6 The lower of the two walls of the chuck is the
7 frustoconical drive surface. That's what has to drive.
8 Regardless of what also happens in the reinforcing bead,
9 it has to drive there. So that belongs in the
10 construction of the lower wall of the chuck.

11 Thus, we pull this together and our
12 construction integrates those concepts which is
13 completely consistent with what they told the patent
14 office when they were saying we should get a patent,
15 even though you've got prior art can ends that seem to
16 do what we're doing because we seam in this radically
17 different way. We have a top wall that's substantially
18 cylindrical on our chuck. We have a different wall.
19 That is where we do the driving. That's in the
20 specification that's throughout the file history. They
21 should be held to it.

22 So we submit that the first
23 circumferentially extending wall has to be discrete,
24 discernibly different. That's from your first decision.
25 The second one has to be the frustoconical drive

1 surface. That flows from your invalidity decision.

2 Crown, on the other hand, fails to include
3 your construction from the last case about two walls on
4 the chuck, distinct and discernibly different. That's
5 inappropriate. And they run from the file history.

6 Also -- well, this is really similar in that
7 when the same language is used in multiple places, it
8 should be construed consistently.

9 Lastly, your Honor, are the terms about
10 bending and deforming. This is what your Honor went
11 into in several decisions with respect to disclaimer,
12 with respect to the file history, that the radically
13 different thing about this invention is supposedly how
14 it seams, how it bends the can end upwardly around the
15 juncture of two walls so that it bends by at least ten
16 degrees and so that it becomes substantially
17 cylindrical.

18 Now, some of these claims use the phrase
19 "adapted to be joined." Others use longer phrases but
20 were describing the same thing.

21 In the prior case, your Honor held that it
22 had to become substantially cylindrical and it had to be
23 bent by more than ten degrees. Since your Honor found
24 no question of fact that it didn't bend by more than ten
25 degrees during seaming, we were granted summary judgment

1 and that was affirmed. As I said before, Crown did not
2 challenge the substantially cylindrical part of your
3 Honor's *Markman* ruling as to the disclaimer. So that is
4 still viable. It still belongs in the claim
5 construction in this case.

6 So we've got the claims that you construed
7 last time in the first case where you basically captured
8 that it becomes substantially cylindrical and the first
9 wall portion's bent by more than ten. That flows right
10 into the agreed-upon constructions. On these two we did
11 agree and everything we're arguing for on the other
12 terms is here. It becomes substantially cylindrical and
13 it's bent by more than ten. However, when we get into
14 the claims that are new in this case, we want to
15 incorporate the same things. It has to become
16 substantially cylindrical which means it wasn't
17 beforehand so it's 20 degrees or more. It has to end up
18 being substantially cylindrical. So it's become
19 substantially cylindrical and it has to bend by at least
20 ten degrees. Right out of Mr. Higham's declaration.
21 Right out of your decisions. Crown however picks and
22 chooses pieces of these.

23 I'll note that claim 32 is the end of the
24 claim 45, the one on the bottom, the one they're
25 asserting against us. That goes even farther than the

1 disclaimer that says you've got to bend by at least 16.
2 So neither of us have put the ten in there because it
3 would be redundant. You've got to bend by at least ten
4 and you've got to bend by at least 16. We both
5 shortened it. The disclaimer is still in there. It's
6 just sort of superseded because the claim requires even
7 more bending.

8 Claim 1 says "adapted to be joined."
9 "Adapted to be joined" in our construction, I'm just
10 drilling down, it has to become substantially
11 cylindrical and be bent by more than ten degrees right
12 out of your decision in the first case supported by the
13 prosecution history. All we're doing here is holding
14 them to what they said in prosecution and what your
15 Honor already found they disclaimed.

16 Then here we've got the citations to the
17 office action reply and Mr. Higham's declaration that
18 underlie your decisions in the first case that during
19 bending, during seaming, adapted to be seamed, during
20 seaming, all of these inventions require both becoming
21 substantially cylindrical and bending by more than ten
22 degrees.

23 There you are specifically saying that it
24 becomes substantially cylindrical, not that it just ends
25 up but it becomes substantially cylindrical.

1 Specifically, as we showed you before, the
2 ten degrees portion of the disclaimer specifically
3 called out and affirmed.

4 Thus, ours -- and I've put three bullet
5 points on the right side. This is the bedrock
6 description of the invention and their disclaimer.

7 First, the upper portion of the can end wall
8 is bent by more than ten degrees during seaming.
9 Secondly, that the upper portion of the can end wall
10 becomes substantially cylindrical during seaming. And
11 the third is really a corollary of part two which is if
12 you're becoming substantially cylindrical during
13 seaming, then you weren't substantially cylindrical
14 before, how does one draw the line? It's because the
15 invention is consistently 20 degrees or less -- I'm
16 sorry. The prior art is 20 degrees or less. The
17 invention's 20 degrees or more. So that needs to be in
18 these claims.

19 Another description, basically what I've
20 said before. We are incorporating this into the
21 description of the upper portion of the can end wall.

22 Crown's proposed constructions, because
23 they're inconsistent and piecemeal, they try to avoid
24 your Honor's holding about ten degrees of bending and
25 becoming substantially cylindrical. Crown has admitted

1 that there's a disclaimer as to the claims that were in
2 the first case but they deny it elsewhere but it's the
3 same invention. It is the same invention. I don't
4 think I put it up here, your Honor, but there's one last
5 point before my conclusion.

6 Crown particularly draws attention to claim
7 1 of the '826. Although they say the same thing about
8 claims 13 and 14. Remember the '826 patent describes a
9 can end that's adapted to be seamed in a certain way.
10 And the '875 describes seaming of a can end that's made
11 a certain way. Your Honor, in the first case, treated
12 them as basically mirror images of each other, so did
13 the parties. You've got to remember in the summary
14 judgment briefing, we didn't make separate arguments for
15 the '826 and the '875. We picked the same language and
16 we applied them both at the same time and the experts
17 did that.

18 Your Honor, that has become -- because when
19 Crown was arguing with the patent examiner and trying to
20 convince him and the examiner was challenging them,
21 Crown was not saying it's this particular claim. Mr.
22 Higham's declaration was as to everything.

23 In particular, the Higham declaration and
24 the brief that went to the patent office along with the
25 Higham declaration that your Honor called out

1 specifically, that one was in the '826 which was the
2 second of the two patents. Your Honor was entirely
3 proper to also read that back against the '875 under the
4 *Microsoft* case that your Honor cited. The federal
5 circuit agreed with that.

6 But the specific declaration, claim 1 that
7 we're now accused of infringing and several of its
8 dependent claims, one through 12 was before the patent
9 examiner. Crown came back and added 13 and 14 and
10 submitted the Higham declaration in its brief, both for
11 one through 12, the ones the examiner had challenged,
12 and for 13 and 14, the one we were accused and your
13 Honor dealt with in the last case. That Higham
14 declaration, the disclaimer that you found, the "become
15 substantially cylindrical and bend at least ten
16 degrees," that isn't just claim 14 from the last case.
17 That is the entire invention. Clearly, the entirety of
18 the claims that are in the '826 patent because that's
19 what Crown offered it for.

20 So finally, your Honor, the best part of my
21 presentation is the part that says "in conclusion," we
22 embrace the Court's findings in your *Markman* order and
23 your summary judgment decisions. Where we're varying
24 from what you did before, we are not asking you to go
25 backwards or to change. We are asking you to clarify

1 and stay consistent with everything that drove all three
2 of your decisions in that case so that now that we have
3 25 claims and we have even more claims using different
4 words to try to describe the same thing, the jury and
5 the experts don't get lost, don't get confused, and
6 don't put pieces or points where they don't belong so
7 that you are sufficiently clear that the case is
8 manageable and the decisions will be correct going
9 forward.

10 Crown, on the other hand, goes back to
11 square one and repropose constructions that you've
12 already rejected, like the can end wall being a single
13 surface, like the chuck having two distinct and
14 discernibly different side surfaces and like the
15 disclaimer that they want to read out of anything that
16 wasn't in the first case. They introduced even more
17 ambiguity which allows arbitrary, improper and
18 self-serving measuring methods. And yes, I am talking
19 about what Mr. Higham tried to do on the summary
20 judgment last time and your Honor correctly rejected.
21 There's going to be more of that if these claims aren't
22 construed with enough clarity. They tried to circumvent
23 your holdings in the last case particularly with respect
24 to this disclaimer.

25 I appreciate your Honor's time and

1 attention. I hopefully will have very few comments in
2 rebuttal, but I'd like to reserve a few minutes for
3 that.

4 THE COURT: Certainly. Is that something
5 you need to bring to my attention?

6 MR. LUKEN: They were reminding me that I am
7 supposed to reserve time for rebuttal which remarkably I
8 remembered on my own.

9 THE COURT: Thank you, Mr. Luken. Give me
10 one moment.

11 Let's handle it in this fashion. You had
12 asked for an hour and 15 minutes and the opportunity to
13 reserve some of that time for rebuttal. You've used an
14 hour and 13 minutes. Why don't I give each side a total
15 of an hour and a half which will give you 15 minutes.

16 Mr. Heist, you can divide your time in any
17 fashion that you wish.

18 We will be in recess for no more than 15
19 minutes. Cindy, I'd like you to line everybody up at
20 about the 13-minute mark and we'll come back into court
21 and we will hear from Crown. We are in recess.

22 (Recessed at 10:33 a.m.)

23 IN OPEN COURT

24 10:49 a.m.

25 THE COURT: Mr. Heist, I assume you will be

1 arguing for Crown.

2 MR. HEIST: Yes, your Honor, although there
3 are a few terms my partner, Mr. Murphy, will argue.

4 THE COURT: That will be fine. I hate to
5 put either of you under this kind of pressure. I
6 apologize in advance, but I must recess no later than 10
7 minutes of 12. So come to a convenient point to pause
8 around and about that time. We'll pick up then at 1:30.
9 All right. Mr. Heist.

10 MR. HEIST: Thank you, your Honor. Mr.
11 Luken started out with what he called bedrock issues.
12 He said it's bedrock that all the claims should be
13 construed the same. We will show you case law that
14 shows that different language in different claims is
15 presumed to create different scope.

16 Mr. Luken said it's bedrock that we will
17 stay true to your prior decision. We will show you how
18 Ball's construction deviates and changes your --
19 deviates from and changes your prior construction.

20 He says it's bedrock that the specification
21 drives the construction of these claims. But we will
22 show you that the words of the claims of which we saw
23 very little is what drives the construction.

24 And he said it's bedrock that the chuck
25 drives on the wall in this patent. But we will show you

1 from your prior decision where they argued that the
2 rotatable chuck must drive on the wall and where your
3 Honor rejected that proposal. I hope to show you that
4 what Ball claims to be bedrock is actually quick sand.

5 Now, I think it's worth pausing for a minute
6 to look at how we've come here after the prior case and
7 how we've arrived back in your courtroom again. I think
8 I'd like to spend a few minutes on a procedural
9 background.

10 Now, before Crown's invention, the standard
11 end was called the B-64. Mr. Luken spoke about that.
12 It had an angle of about 14 degrees, as shown in the
13 drawing that is up on the screen. It was seamed against
14 a chuck that had a wall angle of around four degrees.
15 So it was bent upwardly during seaming about ten degrees
16 which that reality formed the basis of the disclaimer
17 that was found in the last case and that ultimately
18 resulted in the disposition of that case. That end was
19 known. Billions of them were made. Both parties
20 manufactured them.

21 Crown came out with a SuperEnd. It had an
22 angle in the commercial embodiment of 45 degrees. It
23 was seamed as shown in the patent by being bent upwardly
24 during the seaming process against a substantially
25 cylindrical surface, 33, that's shown in figure 6 of the

1 patent, and the patent specification at column 4, line
2 32 says that the surface, substantially cylindrical
3 surface, 33, of the chuck may be inclined at an angle
4 between plus four degrees to minus four degrees.

5 As a consequence of that geometry and that
6 seaming method, the SuperEnd made a tremendous metal
7 savings. Here we have the profile of SuperEnd shown in
8 green overlaid upon the profile of a B-64 end. As a
9 consequence, if you were to take those two lines and
10 think of them as string and you were to pull on the
11 green string and you were to pull on the pink string,
12 you would find that the green string is shorter by a
13 good bit. And as a consequence of the seaming process
14 when the end is put on the can, the can knits in some to
15 meet the seam. When it does, the opening of the can
16 gets a little bit smaller. As a consequence of those
17 things, the blank of metal from which the end is made is
18 much smaller. The diameter of the B-64 end is shown on
19 this drawing. That's not the diameter of the end.
20 That's the diameter of the metal blank that's stamped
21 out and used to form to make the end.

22 With SuperEnd, with the invention, less
23 material is required and because of the geometry of the
24 end, the SuperEnd can be made of thinner material as
25 well. So the consequences of the smaller blank and the

1 thinner metal results in metal savings of approximately
2 one dollar per every thousand ends. One hundred billion
3 ends are used in the United States every year. So a
4 dollar per thousand represents a
5 hundred-million-dollar-a-year annual savings.

6 Since this invention was introduced, Crown
7 and its licensees around the world have sold more than
8 400 billion patented ends.

9 So, what appears to be a simple mechanical
10 invention with no moving parts has a significant
11 economic effect because of the metal savings.

12 Let's look at the timeline of how we got
13 here.

14 In March of 1996, Crown filed its U.S.
15 patent application. It had earlier filed in the United
16 Kingdom where its research labs are located.

17 In January of 1999, Ball learned that
18 SuperEnd was, quote, "designed to reduce metal usage
19 without reducing overall diameter," that means of the
20 can, "and that the savings were due to the use of a
21 tapered chuck wall."

22 In March of 2000, they learned that their
23 customer, Anheuser Busch, had been evaluating SuperEnd
24 and they met with Anheuser Busch to -- this is right out
25 of their documents -- to diffuse any possible juggernaut

1 towards SuperEnd. They didn't want their customer to go
2 to SuperEnd. So they came to Crown in July of 2000 to
3 discuss a license. But the parties did not agree on
4 terms.

5 In June of 2001, Ball and its customer
6 Anheuser Busch formed a joint development pact, the
7 result of which was the development of a light-weight
8 end called the LOF+, Lid Of The Future Plus. It was
9 designed specifically to compete with Crown's SuperEnd.

10 In October of 2001, Ball's lawyers got a
11 copy of Crown's '634 patent which has the identical
12 specification but different claims than the patents that
13 we're litigating here.

14 In October of 2002 Ball decided that it
15 would advance a third parties' development called
16 Container Development Labs. Their end was called the
17 CDL end. Ball decided that they would work on the CDL
18 end while Anheuser Busch, its joint development partner,
19 challenged its '634 patent in court.

20 Here are the profiles between the LOF+ and
21 the original CDL+ end. Anheuser Busch decided they
22 would challenge Crown's patent with regard to the
23 product on the left while Ball developed the product on
24 the right. The idea was if Anheuser Busch was
25 successful maybe they would sell the LOF+, but if they

1 were unsuccessful in court the parties would move
2 forward with the original CDL plus.

3 In March of 2003, Ball came in to Crown
4 again to discuss a license. Again, the parties could
5 not reach agreement. Ten days later, Anheuser Busch
6 sued Crown and asked for a declaration that the LOF+
7 didn't infringe Crown's patent.

8 In November of 2003, the Eastern District of
9 Wisconsin Judge Shabaz ruled that the LOF+ did not
10 infringe Crown's patent. But in December of 2004, the
11 federal circuit reversed that decision. Shortly
12 thereafter, Ball invested more than a hundred million
13 dollars in new high-speed machines to make the original
14 CDL+ ends. The reason they did it is customers
15 demanded -- this is right from their document -- cost
16 savings from all end makers as a result of the reduced
17 metal usage Crown SuperEnd. Their investment in the
18 CDL+ was driven by Crown's SuperEnd and the competitive
19 pressures that it reduced.

20 In February of 2005, the first of the two
21 patents that we had litigated here, the '875 patent was
22 issued.

23 Ball's engineers saw the patent right away.
24 They said we need to do some homework.

25 In August of 2005, Anheuser Busch, their

1 joint development partner, agreed to pay royalties to
2 Crown to settle their dispute. They agreed to pay not
3 only on the LOF+ that had been jointly developed with
4 Ball, but they also agreed to pay on the original CDL+
5 ends if they were purchased from Ball. Thereafter, they
6 began to pay royalties. When their joint development
7 partner took a license, Ball anticipated litigation.
8 Then entered into -- four days later, they entered into
9 a joint defense agreement with Container Development
10 Labs. Their premonition that there could be litigation
11 was right on the money because the next day Crown filed
12 suit in this court for infringement of the '875 patent
13 alleging that the original CDL+ infringed that patent.

14 Two weeks later, Crown's '826 patent, the
15 second patent involved in this case, was granted and
16 Crown immediately amended the complaint to add it.

17 In 2006, this high-speed machinery came to
18 Ball and it had a lot of problems. They were having
19 difficulty getting their product manufactured on the new
20 machinery.

21 In April of 2008, this Court's *Markman*
22 ruling came down and, among other things, required that
23 during the seaming operation that deformation be more
24 than ten degrees. Crown had argued that there was no
25 disclaimer. The Court disagreed with us and your ruling

1 governed the case going forward.

2 A month later, Ball moved for summary
3 judgment of invalidity on the grounds of claim
4 indefiniteness, inadequate written description,
5 anticipation, and obviousness. They also moved for
6 summary judgment of non-infringement on the ground that
7 the original CDL+ was not bent more than ten degrees
8 during seaming, as your Honor's ruling required.

9 As soon as -- that motion was then
10 ultimately granted in September 2009 when the Court
11 ruled that the claims were invalid on the grounds of
12 anticipation and inadequate written description.

13 Immediately after the Court's ruling, I
14 think it was just a few days, Ball changed the geometry
15 of the CDL+ end that we had litigated, and they came out
16 with what they now call the new CDL+ end, but they
17 didn't tell us and they didn't tell the Court about the
18 change in their process.

19 The original CDL+ end, their expert
20 testified, had an angle before seaming of 13 degrees, as
21 shown on the left in slide 21. We submit that the new
22 CDL+ end has an angle of 17 degrees before seaming. So
23 while the old original CDL+ was subject to your Honor's
24 eventual ruling of non-infringement, the new CDL+ did
25 not operate within the safe harbor that was created by

1 the litigation between the parties in the prior case.

2 Crown appealed the invalidity ruling to the
3 federal circuit in October 2009 and it appealed the
4 written description and anticipation rulings. But the
5 Court ruled that the claims were not indefinite and Ball
6 never cross-appealed from that.

7 In April of 2011, the federal circuit
8 reversed the invalidity rulings. In the summer of 2011,
9 the Court took up that portion of Ball's motion for
10 summary judgment of non-infringement.

11 In November of 2011, Crown through its own
12 initiative found some CDL ends in the market and, when
13 we evaluated them, we came to the conclusion that the
14 product had changed. And we came to the Court and we
15 said: Look, we've litigated this original CDL+ end but
16 it appears to us that the product has been modified.
17 And Ball's counsel came in and said, well, you're right,
18 we made a manufacturing change which unknown to us ended
19 up making a slight tweak in the shape of the CDL+.

20 Now, the original CDL+, as your Honor
21 ultimately ruled, was deformed less than ten degrees
22 during seaming. The new CDL+, we submit, is deformed
23 more than ten degrees during seaming. So what Ball
24 characterized as a slight tweak is the movement of the
25 product from the safe haven created by the prior lawsuit

1 into harm's way with Crown's patents.

2 In January of 2012, the Court entered
3 judgment that the original CDL+ did not infringe because
4 of the ten-degree deformation limitation.

5 The next day Ball filed this case and asked
6 for a declaration that the new CDL+ did not infringe.

7 In August of 2012 Ball's engineers tried but
8 failed to make the CDL+ end with deformation that was
9 less than ten degrees. So they were having some
10 difficulty going back to the safe harbor. That's why
11 we're here. That's why, unfortunately for everyone,
12 this case is still moving forward.

13 Crown has two patents. The '826 covers a
14 can end. If the can end were sitting on this table, the
15 claims of that patent have to cover the end as it sits
16 here on the table. It's a product patent that covers
17 the thing.

18 The '875 patent, a method of seaming patent,
19 it covers the steps of seaming an end to a can body. So
20 it covers the process of seaming. So the end is defined
21 by what it is and the process is defined by how the
22 steps of the method are applied in the seaming process.
23 They are two separate patents. The patent office said
24 they were two separate inventions. And the two patents
25 therefore fall into two separate, what patent lawyers

1 would call statutory classes.

2 This is an article on the left, the '826
3 patent, and a method on the right. It has consequences.
4 The claim language of these patents and the difference
5 in claim language has consequences that cannot be
6 ignored.

7 We have a lot of claims at issue. I promise
8 your Honor that between now and the time of trial or
9 even summary judgment we are going to cut some of these
10 claims out of this case. We're still in discovery. In
11 fact we had the first deposition last week and so we're
12 still trying to decide which claims we're going to
13 assert. The task of deciding what these claims mean is
14 not great as Mr. Luken would suggest.

15 The reason why is we asserted claim 14 of
16 the '826 patent and claim 50 in the last case and many
17 of the terms that are at issue in all of these claims
18 were resolved in that decision. We're also asserting in
19 this case, claim 1, an independent claim of the '826
20 patent, and some dependent claims, but all of the terms
21 in dispute are in the independent claim. So all those
22 dependent claims don't add any burden on the Court or
23 the parties to figure out what the patent means because
24 there are no additional terms in the dependent claims
25 that give rise to a construction issue.

1 We're asserting claim 14 of the '875 patent
2 in this case. It wasn't asserted in the last case.
3 Again, all the claim construction issues can be resolved
4 by that claim without considering the dependent claims.
5 We're sorting dependent claim 45 which depends from
6 independent claim 32. Again, all of the claim
7 construction issues are in the independent claim.

8 Similarly, we're asserting dependent claims
9 from claim 50. In the last case we had just the
10 independent claim. Now, we've added a number of
11 dependent claims. But again there are no issues raised
12 by the language of the dependent claims. Everything's
13 in the independent claim. So it's not as burdensome as
14 it might appear. That said, there are still more claims
15 than we will probably ultimately litigate or take to
16 trial.

17 So, there are 23 claim terms. We've listed
18 them here and numbered them using the order that they
19 appear in Ball's brief, 1 through 23. Of those 23
20 terms, eight were already construed by the Court in the
21 last case.

22 The *Markman* process in the last case was
23 not -- it wasn't quick, it wasn't simple. It was
24 complicated. It took 22 months, a hundred pages of
25 prehearing brief, a six-hour hearing, 77 pages of

1 post-hearing briefs, and a 53-page opinion. The Court
2 and the parties spent a great deal of time.

3 We're not proposing anything in this case
4 regarding the construction that your Honor entered in
5 the last case except there are a couple of issues that
6 we argued before and we continue to urge here and we'll
7 see them in a moment. But by and large, we are
8 accepting the claim construction that your Honor entered
9 in the last case with a few exceptions that I'll point
10 to.

11 There are 11 terms in this list of 23 that
12 are simply plain English terms. And when you read the
13 claim, the definition of those terms is found in the
14 claim itself. It's common in writing patent claims to
15 refer to a first widget, a second widget, a third
16 widget. Those terms are used, first, second, third, by
17 a drafter to draw a distinction between elements in the
18 claim. They're not really structural elements. It's a
19 way to make the claim read as English in a way that is
20 precise.

21 First point, first location, second point,
22 second location.

23 All of those terms are defined in the claims
24 themselves as we'll see in a moment. So our view is the
25 Court doesn't really need to construe those 11 terms I

1 should say beyond what is in the claim itself. The jury
2 can determine the meaning of those terms from the
3 content. We'll see that in a moment.

4 That leaves four terms that were not
5 construed before, are not plain English, that we think
6 the Court should focus on. That's terms 1, 21, 22, and
7 23. That said, we're going to go through all 23 terms
8 and explain to you why we think our construction is
9 correct and where we disagree with Ball. Why we think
10 their construction is incorrect.

11 Ball and Crown are like two ships passing in
12 the night with regard to where you start. And where you
13 start determines where you finish. Ball starts from the
14 drawings in Crown's patent. We didn't see the claim
15 language by and large. We saw the drawings from the
16 patent. Their view is, what a patent is all about is
17 you have a drawing, it's got all these features. Then
18 we have to take the claims and we have to breathe all
19 this language into the claim so that the claim looks
20 just like the picture. The case law says otherwise.

21 Claim construction begins with the words of
22 the claim. This is from *Phillips* en banc. We look to
23 the words of the claims themselves to define the scope
24 of the patented invention. The written description part
25 of the specification itself does not delimit the right

1 to exclude. That is the function and purpose of claims.

2 Now, this case *Thorner versus Sony*, 669
3 F.3d, 1362, Fed.Cir. 2012 I don't think is in our brief,
4 but it's a very important case because it says there are
5 only two exceptions that are noted as to when the
6 language of the claims doesn't control. Those are when
7 a patentee sets out a definition in his specification in
8 the language of the case where the patentee acts as his
9 own lexicographer. When I use the term "framus
10 injector" in my patent, I mean X. Now we know what a
11 framus injector is because the patentee defined the
12 term.

13 The second time when the language of the
14 claim doesn't govern is when there is a disavow. Your
15 Honor has a found disavow in this case with regard to
16 the ten-degree bending which we accept. I didn't hear
17 Ball say that there was any other disclaimer but for
18 that one. I didn't hear Ball say that there was any
19 definition of any term in the claim found in the
20 specification that they were asking your Honor to adopt.

21 So this case, therefore, is not governed by
22 the exceptions of lexicography and disavow. It's
23 governed by the basic black letter principle in *Phillips*
24 that claim construction begins with the meaning of the
25 words in the claim. Now that said it's perfectly

1 appropriate and even required to read the specification
2 of the patent to understand the context and the nature
3 of the invention. What is error, however, is what Ball
4 is urging which is to breathe the specification
5 wholesale into the claims.

6 Here's some four principles of law that are
7 appropriate to this case. *Rexnord versus Laitram*. It
8 is improper to read limitations from the specification
9 into the claims. *InterDigital versus ITC*. It is
10 improper to read limitations from the dependent claims
11 into independent claims. Here's a case, *Karlin versus*
12 *Surgical Dynamics*, 177 F.3d 968. It's improper to treat
13 different claim terms as having the same meaning. We
14 cited *Modine* in our brief for the same principle, the
15 *Modine* case. The language of the federal circuit.
16 Different words or phrases used in separate claims are
17 presumed to indicate that the claims have different
18 meanings and scope.

19 Ball's bedrock principle that everything has
20 to be construed the same is to blur the distinction
21 between the language that the drafters used in creating
22 the claims of these two patents. *Virginia Panel*. It is
23 improper to add modifiers to descriptive terms standing
24 alone. The District Court was reversed for taking the
25 unmodified term "reciprocating" and limiting it to

1 linear reciprocation because it wasn't in the claim
2 language itself.

3 Ball's positions invite error. I'm going to
4 read from *MBO Labs versus Becton Dickinson*. Patent
5 coverage is not necessarily limited to inventions that
6 look like the ones in the figures. To hold otherwise
7 would be to import limitations onto the claim from the
8 specification which is fraught with danger.

9 Then *SRI* which is in our brief. If
10 everything in the specification were required to be read
11 into the claims, there would be no need for claims. In
12 Ball's world, we would put the claim language first and
13 the picture at the end. We would compare the picture,
14 figure or whatever from the patent with the accused
15 product and we decide whether there's infringement. If
16 they look different, they would say there's no
17 infringement. That's not the rule. That's not the
18 test. It's backwards.

19 Let's start with the "Wall" group of claims.
20 There are two spots in the claims where the word "wall"
21 appears. In one case we're talking about a can end
22 wall. In another case we're talking about a chuck wall.
23 The drafting of these claims could have been clearer by
24 using different terms to keep them separate. But we're
25 talking about the wall group of terms, which in Ball's

1 brief would be terms 2, 3, and 4 if we count from the
2 beginning of their brief. The Court construed these
3 terms before in claim 14 of the '826 patent. The Court
4 ruled that a wall extending inwardly and downwardly
5 meant a can end wall extending inwardly and downwardly.
6 Possibly to draw the distinction from the chuck wall.
7 Then the Court went on and said that it would explain to
8 the jury that the can end wall is a single surface.

9 With regard to similar language in claim 50
10 of the '875 patent, the Court says, a circumferentially
11 extending wall extending from the seaming panel to the
12 reinforcing bead means a can end wall which is a single
13 surface encircling the center of the can end extending
14 from the seaming panel to the reinforcing bead.

15 So here we have two similar terms, one in
16 the '826 patent and one in the '875 patent but the
17 language of the claims is different, and the Court in
18 its construction gave a different and more comprehensive
19 construction to the second term than it did with regard
20 to the first in the '826 patent. The reason, I submit,
21 that your Honor gave it a different construction is
22 because the language of the '875 patent claim 50 was
23 different and your Honor's construction took that into
24 account as was appropriate.

25 In claim 14 of the '826 patent, your Honor's

1 construction didn't say that the wall had to encircle
2 the end.

3 In claim 50 of the '875 patent, your Honor's
4 construction said that the wall must encircle the end.
5 Why? Because the language in claim 50 included the
6 words "circumferentially extending." So your Honor drew
7 the distinction between claim 50 and claim 14 because
8 claim 50 had a word in it that claim 14 did not.

9 In claim 50, your Honor's construction said
10 that the wall had to extend to the reinforcing bead.
11 Your Honor's construction of claim 14 did not have that
12 requirement. And why? Because the language of the
13 claims was different.

14 Ball would come along now and say we should
15 sweep all of the differences and language away. It
16 doesn't matter. But that violates the principle of the
17 *Modine* case. The different terms used in different ways
18 have different constructions.

19 Now, Crown's construction of these terms
20 adopts the Court's construction with one exception. We
21 didn't think in the last case and we don't think now
22 that the claim requires a single surface.

23 Now, the reason why we took issue with that
24 in the last case can be seen in slide 41 which is a
25 quote from our brief in the last case. We said: By

1 putting the term "single surface" into the wall, we were
2 concerned that Ball was going to say that the can end
3 wall had to be a flat uniform surface. Thus far, they
4 haven't made that argument. So possibly this single
5 surface issue is a mountain out of a molehill because it
6 doesn't seem to be creating an issue in the case. But
7 the reason why we took exception to it before was
8 because in the *Anheuser Busch versus Crown* case, the
9 federal circuit in an unpublished opinion said: Look,
10 there the District Court said that the wall had to be
11 flat and the federal circuit said no, the wall doesn't
12 have to be flat. It can be other shapes. It doesn't
13 have to be flat the way it's shown in the patent. The
14 federal circuit said no basis exists for the Court to
15 import the flat limitation of the preferred embodiments
16 into the claims because other than the reference to the
17 patent's preferred embodiment Anheuser Busch can point
18 to nothing in the written description requiring the
19 invention to be narrower than the scope of the claims.

20 We were concerned that the term "single
21 surface" might be sort of a round-about way of
22 reintroducing the word "flat" into the wall which the
23 federal circuit already said didn't have to happen in a
24 related patent.

25 Again, it doesn't seem to have created an

1 issue on the infringement side in the last case. I
2 don't think it will in this case. But we're preserving
3 our position that the word "single surface" isn't
4 required.

5 Ball, on the other hand, says they want the
6 same construction for all three terms while extending
7 inwardly and downwardly in claim 14, circumferentially
8 extending wall in claim 32 and dependent claim 45, and
9 circumferentially extending wall from the seaming panel
10 to the reinforcing bead in claims 14 and 50 on the '875
11 patent.

12 Let's take that language that Ball would
13 like to see inserted in all three of those
14 constructions. Let's focus first on the idea that it
15 has to be a surface, a single surface encircling the
16 center of a can end, according to them, which is engaged
17 by a chuck and which extends from the cover hook to the
18 reinforcing bead. So let's look at where they get this
19 "engaged by a chuck."

20 First of all, a wall, if we start with the
21 plain meaning of the word "wall," a wall -- the plain
22 meaning of the word "wall" doesn't require engagement by
23 a chuck any more than the plain meaning of the back wall
24 of this courthouse means engaged with a picture frame.
25 A wall isn't defined by what it engages. It certainly

1 doesn't have to be.

2 Now, in the *Crown versus Ball* appeal on
3 written description, Judge Whyte, sitting by
4 designation -- this was in the last appeal in the
5 federal circuit -- noted that claim 14 of the '875
6 patent, which is the one that we're construing right
7 now, was a product claim, just as I said a moment ago.
8 The claims covers the can end as it sits on a table.

9 And he says, claim 14 as a product claim
10 recites structural limitations as opposed to method
11 steps. So to define a wall as a wall that must be
12 engaged by a chuck is to define a thing not by what it
13 is but by how it's used. Generally speaking, that's
14 inappropriate.

15 Let's look at claim 1 of the '826 patent.
16 Claim 1 doesn't even mention a chuck. Has nothing
17 whatever to do with a chuck. Nothing to do with drive.
18 Nothing to do with chuck engagement. It's referring to
19 a can end. It doesn't have to be adapted to do
20 anything. It's defining the thing by what it is. So it
21 would be error to construe claim 1 of the '826 patent to
22 have anything whatever to do with a chuck.

23 Claim 13 and 14 of that same patent has
24 different language. There it says that the wall of the
25 end must be adapted to be deformed during seaming so as

1 to be bent upwardly around the juncture of the chuck
2 walls. So that claim requires an end that's adapted to
3 be deformed but doesn't actually require it to be
4 deformed. It doesn't require the presence or absence of
5 a chuck. It certainly doesn't require engagement with a
6 chuck. The language of the claim doesn't say that.

7 Here on slide 48, I have the examiner's
8 reasons for allowance of claim 14 of the '826 patent. I
9 won't bother to read it. But the examiner says nothing
10 about the engagement with a chuck. He says that the
11 wall portion must be adapted to be deformed during
12 seaming as to be bent upwardly around the juncture of
13 the chuck walls at a first point, but he doesn't say
14 that the wall has to be driven by the chuck at that
15 first point if "engagement" and "driver" mean the same
16 thing.

17 Now, Ball's proposal to read the word
18 "engagement" into the common term "wall" in the '826
19 patent is a proposal to limit the claim to the
20 embodiment shown in the specification. Under the
21 *Phillips* case, that's error. If everything from the
22 specification were required to be read into the claims,
23 we don't need claims.

24 Let's look at the '875 patent because there
25 the claims do require chuck engagement, but not the

1 engagement Ball seeks to read into those claims. The
2 asserted claims, 14, 32/45, that would be independent
3 claim 32 and dependent claim 45, and claim 50 of the
4 '875 patent, every single one of them require explicitly
5 bringing the chuck into engagement with the can end.
6 But the claim language says bringing the chuck into
7 engagement with the end. It doesn't say bringing the
8 chuck into engagement with the can end wall.

9 Now, when the drafter of the '875 patent
10 wanted to show that he knew how to say it because in
11 claim 1 which is not asserted here, there's language in
12 clause C, bringing the chuck into engagement with the
13 can end so that the juncture of the chuck walls contacts
14 the inclined wall of the can end, but the asserted
15 claims merely require that the chuck engage the end,
16 unlike claim 1 which requires contact between the chuck
17 and the wall.

18 Now, this is very important. Claim 24 and
19 42 of the '875 patent -- which depend from the claims
20 that are asserted but which are not asserted here --
21 explicitly require that there be engagement with the can
22 end wall as shown on slide 54. So in the unasserted
23 dependent claims, there has to be engagement with the
24 wall but in the asserted independent claims, there
25 merely has to be engagement with the end so the broad

1 independent claims are broader than the dependent claims
2 that are not asserted.

3 *Phillips*. The presence of a dependent claim
4 that adds particular limitation gives rise to a
5 presumption that the limitation in question is not
6 present in the independent claim.

7 *Nazomi versus ARM Holdings*, 403 F.3d 1364,
8 the concept of claim differentiation normally means that
9 limitations stated in dependent claims are not to be
10 read into the independent claims from which they depend.

11 *Ball*, on the other hand, would require
12 engagement with the wall even in claims which only
13 specifically require engagement with the end and ignore
14 the dependent claims that add those specific
15 requirements.

16 As an aside in a recent case *Deere versus*
17 *Bush* -- that's an interesting Defendant's name -- *Deere*
18 *and Company versus Bush Hog, LLC*, 703 F.3d 1349, Fed.
19 Cir. Chief Judge Rader reversed summary judgment of
20 non-infringement and said: The District Court
21 erroneously construed the term "into engagement" with
22 "to require direct contact between two components."

23 So even if the word "engagement" were to be
24 written into claim language, an engagement with the
25 walls, here's a similar case with similar language

1 saying that doesn't necessarily even require direct
2 contact. Every case turns on its facts, but it's
3 interesting to note that Ball is reading this limitation
4 "engagement into the wall" into every claim even those
5 in which it doesn't appear.

6 The other limitations they wish to insert
7 into the wall terms are that the wall encircle a can end
8 and that it extend to the reinforcing bead.

9 Let's look first at claim 13/14 of the '826
10 patent. There if we look at the claim language which
11 Ball didn't really show, the language of the claim says
12 it has to be a wall extending inwardly and downwardly
13 from the cover hook. But there's no mention of the word
14 "circumferentially." So there's no reason to import
15 into claim 13 any requirement that the wall encircle a
16 can end. And there's no mention of the reinforcing bead
17 in claim 13. That doesn't appear until claim 14. If we
18 were to take Ball's limitation, the way they would
19 construe the patent and read it into claim 13 -- and if
20 we look at slide 60, we've done that; we've removed the
21 wall language and put in its place "Ball's
22 construction." It would say: A single surface
23 encircling the center of the can end which is engaged by
24 the chuck during seaming extending from the cover hook
25 to the annular reinforcing bead, but in the language of

1 claim 13 there is no reinforcing bead. The claim
2 doesn't require a reinforcing bead.

3 So their language, if we insert it into the
4 claim, would make the claim itself ungrammatical. That
5 doesn't help the jury. The reinforcing bead doesn't
6 appear until claim 14 and so their construction would
7 make the claim not read grammatically from top to
8 bottom, which it should if the construction is
9 appropriate.

10 So let's look at claim 32 and dependent
11 claim 45 of the '875 patent. Again, they want the chuck
12 to encircle the can end. There, it should because the
13 claim language says circumferentially extending, but
14 they say it has to extend to the reinforcing bead. But
15 if we look at claim 32, there's no mention of a
16 reinforcing bead. That doesn't appear until claim 45.
17 So again, if we were to put their construction into
18 claim 32, it becomes, again, ungrammatical because it
19 refers to the surface extending to the reinforcing bead,
20 but that doesn't appear until we get to dependent claim
21 45.

22 Let's go on to the next term group, five and
23 six in their brief, the first point and first location.

24 The same claim construction principles
25 apply. The words of the claim define the invention, not

1 the specification. We don't have to read the entire
2 specification into the claims.

3 Improper to read limitations from the spec
4 into the claims. *Rexnord*.

5 Improper to read limitations from dependent
6 claims to independent claims. *InterDigital*.

7 Improper to treat different claim terms in
8 different claims as having the same meaning. *Karlin* and
9 *Modine*.

10 So Crown's construction of first point and
11 first location is very simple. It's a first point on
12 the can end wall, not some other place. It's on the can
13 end wall. By the way, let me just as an aside, I agree
14 with Ball. The term "first point" appears in two
15 different contexts in the '826 patent. In claim 1, the
16 term "first point" is referring to one point, and in
17 claims 14 and dependent claims, it's referring to a
18 different first point. The parties agree with that. I
19 don't think that's a point of dispute.

20 So here we're talking about, not the claim 1
21 first point but the claim 14 first point. It's an
22 unfortunate way that the claim was drafted because it
23 does add confusion. But at least the parties are in
24 agreement that we have to construe that term differently
25 from claim 1 to claim 14.

1 Now, in the *Brown versus 3M* case, the Court
2 said -- federal circuit said: These are not technical
3 terms of art and do not require elaborate
4 interpretation. It doesn't mean that we can ignore
5 them. But it's not like we're trying to define
6 something that only a person skilled in the art can
7 understand. "First point," "first location" are these
8 drafters' sign posts to help somebody be able to read
9 the claim from top to bottom.

10 *ActiveVideo Networks versus Verizon*, 694
11 F.3d 1312. The District Court did not err in concluding
12 that these terms have plain meanings that do not require
13 additional construction. So if the Court wishes to
14 construe these terms, it can. It doesn't have to. But
15 we submit that the construction and the understanding of
16 where the terms come from, come right out of the claims
17 themselves which is why our construction seems so
18 barebones. Whereas, Ball's seems so elaborate.

19 Ball admitted in its brief the Court
20 declined to construe first point in the last case
21 because it found that the location was clear in the
22 claim itself. It didn't require construction.

23 Now we're looking at claim 14 of the '826
24 patent and the word "first point" appears. So the first
25 point is referring to the point where the wall portion,

1 can end wall, is adapted to be deformed during seaming
2 so as to be bent upwardly around the juncture of the
3 chuck wall.

4 So there's the definition of the first point
5 and where it is to be found right in the claim itself.
6 Which is why our construction doesn't add that language
7 because it's already found there.

8 Now, let's take a look at the '875 patent.
9 Because the term "first location" is defined differently
10 in claim 14 of the '875 patent as it is in claim 50. In
11 claim 14, the first location is defined in the claim
12 itself as "the transition from the substantially
13 cylindrical wall portion to the second wall portion."
14 It's referring to a point which is determined after the
15 end has been seamed to the can.

16 In contrast, claim 50 says "the first
17 location is where the wall is bent around the juncture
18 of the chuck walls," and there it's referring to the
19 unseamed can end. So while we have maybe the same
20 point, it may turn out to be the same point, but the
21 language of the claim and the way one gets to the answer
22 is a function of how the language is set out in the
23 claim itself.

24 Ball says "first point" is where the
25 juncture of the chuck walls engage the can end wall.

1 That construction they wish to impose across both
2 patents all asserted claims.

3 Let's take a look at claim 14 of the '826
4 patent. There, the language of the claim says "a wall
5 extending inwardly and downwardly adapted to be bent
6 upwardly around the juncture of the chuck walls."
7 That's where the first point is.

8 There's nothing in that claim that requires
9 engagement with a chuck. It might have to bend around
10 the juncture of the chuck, but it doesn't require that
11 the chuck drive the end at that first point using Mr.
12 Luken's language. But let's look at how the claim
13 language changes, if we shift now to the '875 patent.

14 Again, Ball's construction is the same.
15 Let's take a look, however, at the actual language of
16 the claims. Claims 14, 32 and dependent claim 45 and
17 claim 50, all explicitly require that the chuck engage
18 the can end, not the can end wall. So if the chuck
19 engages the can end in the bead, the claim is satisfied
20 regardless of whether it engages the can end wall
21 because the claim language in the asserted claims is
22 broad.

23 Ball would say: Well, that's beyond what's
24 disclosed in the specification, but the federal circuit
25 in *Phillips* has said: Just because, you know, there's

1 only a single embodiment doesn't mean the claims are
2 limited to that embodiment. The claims can be broader,
3 and often are broader, than the embodiments disclosed in
4 the specification.

5 In this particular case, chuck engagement
6 with the wall is explicitly claimed in dependent claims
7 24 and 42 of the '875 patent which refer back to the
8 asserted independent claims. There -- in those claims,
9 there does have to be engagement between the chuck and
10 the wall and the juncture and the wall, but those claims
11 are not asserted. It's error to read limitations from
12 the dependent claims which are not asserted into the
13 broader independent claims.

14 Similarly, claims 14 and 32 and 45 but not
15 claim 50 have a different definition of the chuck. In
16 claims 14 and 32, the chuck merely has to have a first
17 circumferentially extending wall. There's not any
18 reference -- there's no reference in either of those two
19 claims to the juncture of a chuck. So Ball's
20 construction that requires that the chuck juncture
21 engage the can end wall ignores the difference in
22 language because in these two claims, unlike claim 50, a
23 chuck juncture is not a requirement of the claim itself.

24 If we can, let's go on to the peripheral
25 cover hook. I think it's best to consider that term in

1 conjunction with first point. I actually don't think
2 the parties are all that far apart on their
3 constructions of these two terms. But there is some
4 mischief that I think we need to -- potential mischief
5 that we need to clear up.

6 Crown's construction of peripheral cover
7 hook is an outer portion of an unseamed can end
8 encircling the end. Our construction doesn't say, but
9 possibly it should have, we should have added the
10 language "that is to be formed into a double seam."
11 That language is found in Ball's construction. And on
12 reflection I think it should be in ours as well.
13 Because that is the, it's that outer portion of the end
14 that encircles the end and that is to be formed into the
15 double seam that the patent is referring to.

16 If we look at figure 4 of the patent, it
17 shows us where the peripheral cover hook is. It's shown
18 at element 23 in figure 4.

19 Ball says: Well, the peripheral cover hook
20 has to be the outermost curved portion of the can end
21 that is placed on the can body flange and is to be
22 formed into a double seam. They note, accurately, that
23 we sought that curved construction in the *Rexam* case and
24 we were successful in getting it. Frankly, I don't have
25 much disagreement that the peripheral cover hook is

1 curved.

2 Our exception is if we look at the drawing
3 and we look at the cover hook, if you look at the far
4 outside where the numeral 23 is shown in figure 4,
5 there's a portion that's almost vertical and is kind of
6 straight. It looks like it's a vertical straight
7 segment. So our concern with the idea of a curved
8 peripheral cover hook is only that the cover hook is
9 normally curved but it could have a straight segment and
10 still be a peripheral cover hook. If what Ball is
11 seeking to say is that it can't have any flat portion,
12 then we would disagree with that. But we don't really
13 disagree that the cover hook is curved because generally
14 speaking it is, as shown in figure 4.

15 Now, we say that the term "first point" --
16 now, this time we're talking about the different first
17 point, the one in claim 1 of the '826 patent and not the
18 one in claim 14. Again, there's two usages of the term
19 "first point." It's important to keep them separate
20 because they refer to different things. We say it's a
21 first point on the can end wall. Why is our
22 construction so barebones? Because the patent claim
23 itself defines the first point. It even uses the word
24 "defines." It says: "The location at which said wall
25 extends from said peripheral cover hook defines a first

1 point." So our construction is merely a first point on
2 the can end wall that defines the location at which said
3 wall extends from the peripheral cover hook. It's just
4 the language of the claim. It's self-defining.

5 Ball says it has to be the innermost point
6 on the end at which the cover hook terminates. In and
7 of itself, we don't even have much of an objection to
8 that. It seems redundant. If we take the language of
9 the claim and we put Ball's construction in there, it
10 says: "The location at which said wall extends from
11 said peripheral cover hook defines an innermost point
12 and cross-connection on the end at which the cover hook
13 terminates." To me that seems redundant. I suppose it
14 doesn't do any harm.

15 The problem that we have with Ball's
16 construction is the gloss that they put on it in their
17 brief.

18 Here we put an excerpt from their brief at
19 page 24. They say: "Ball claims that the first point
20 is the innermost point on which -- on the end at which
21 the cover hook terminates." So far so good. We really
22 don't disagree with that. But then they continue. They
23 say that is, quote, "the point at which the can end wall
24 begins to curve away from the line that marks angle C."

25 There's where we have our disagreement with

1 Ball. So it's really in the construction of the
2 construction. It's in the gloss that we find in their
3 brief and the way they apply the construction to the
4 preferred embodiment.

5 If you look at figure 4, Ball points to the
6 first point as we show on slide 94.

7 To understand why we have this disagreement,
8 the parties agree that the peripheral cover hook
9 includes a segment known as the seaming panel. Mr.
10 Luken mentioned that. We agree that the seaming panel
11 is the curved innermost portion of the peripheral cover
12 hook. So if we look at slide 95, you can see the
13 seaming panel is a part of the peripheral cover hook.
14 Therefore, the language that we're arguing about is:
15 Where does the first point that defines the location at
16 which the wall extends from the peripheral cover hook,
17 which is really another way of saying where does the
18 wall extend from the seaming panel?

19 In slide 95, we see the wall, we see the
20 seaming panel. The question is: Where is the point
21 that demarcates one from the other?

22 In the specification at column 4, there's a
23 reference to radius r_1 , which is referred to in the
24 patent as the seaming panel chuck wall radius. So the
25 specification is telling us that the point where the

1 seaming panel stops and the wall begins is in the middle
2 of that arc defined by that radius r_1 .

3 Crown's view is the first point is right
4 there as shown in the drawing. So Ball's first point
5 is, according to their brief, is the point at which the
6 can end begins to curve away from the line that marks
7 angle C. We've shown on slide 97 where they would read
8 the first point. We've shown where we would read the
9 first point. They're slightly different.

10 Now although we're talking only about claim
11 1 of the '826 patent, it's important to note that in
12 claims 14 and 32 of the '875 patent, there's a reference
13 to the fact that the wall that we're talking about here
14 comprises a radiused portion. And the support for that
15 language in those claims comes from figure 4 because in
16 Crown's view of the patent, there's a portion at the
17 very top of the wall which has a radius. So there can
18 be -- so the can end wall, where it meets the seaming
19 panel, can have some curvature to it, and that's
20 consistent with what the federal circuit found in the
21 *Anheuser Busch* case because in that case they found that
22 the can end wall need not be flat. So here we have
23 claims that refer to a can end wall with a radiused
24 portion and we have the federal circuit telling us in
25 the *Anheuser Busch* case that the wall need not be flat.

1 So Crown's view is the first point in claim
2 1 and only in claim 1, is referring to the middle of the
3 arc that defines the seaming panel chuck wall radius.
4 Whereas, Ball would seem to suggest that the wall must
5 be flat, must be straight, and any part of that
6 curvature must be considered to be part of the seaming
7 panel. That's an issue with which we disagree with
8 them.

9 Your Honor, it's almost ten of. I am about
10 two-thirds finished. Would this be a good time to
11 break?

12 THE COURT: I think it would be, Mr. Heist.
13 I thank you for alerting me to that. Give me just one
14 moment, gentlemen, if you would.

15 Why don't we be in recess then until 1:30.
16 Mr. Heist, you're at the 58-minute mark. You seem to be
17 on schedule. Again, each side has an hour and 30
18 minutes total. Thank you all.

19 We are in recess at this point.

20 (Recess taken at 11:48 a.m.)

21 IN OPEN COURT

22 1:30 p.m.

23 THE COURT: All right. Mr. Heist.

24 MR. HEIST: Thank you, your Honor. Your
25 Honor, before I begin, would it be possible for me to

1 possibly go five or ten minutes overtime? I'd be happy
2 for Ball to have similar time. I'm concerned I'm not
3 going to be able to finish.

4 THE COURT: I'll give you that extra time,
5 not to exceed ten minutes. I'll give Mr. Luken the
6 same.

7 MR. HEIST: I'd like to reserve five minutes
8 total for rebuttal but I think I can finish in the time
9 now.

10 THE COURT: Do what you can do, sir.

11 MR. HEIST: Thank you.

12 THE COURT: Don't rush. It's too important.

13 MR. HEIST: So I'd like to next turn to the
14 "second point" and "second location" term group. The
15 term "second point" forming a lowermost end of the wall
16 is already construed by the Court in claim 14 of the
17 '826 patent. The Court said it was the second point
18 that marks the lowest end of the can end wall. That's
19 the construction that Crown believes should be adopted
20 again here.

21 Now, Ball would like to change that
22 construction and say that it is the point where the can
23 end wall is angularly offset from the reinforcing bead.
24 But Ball has really already lost this issue, not once
25 but twice. Now it was argued slightly differently but

1 it's the same point.

2 They argued in the last case that they
3 needed to know where the wall stops and the bead starts.
4 Where they said they couldn't apply the claim.

5 Your Honor's opinion said Defendant -- in
6 the *Markman* order from the last case, said Defendant
7 argues that the annular reinforcing bead is or must be
8 clearly distinct from the wall and directly connecting
9 to the wall at a clear, distinct second point forming a
10 lowermost end of the wall. That was Ball's argument at
11 the time. The Court said no, I'm going to decline to
12 adopt that construction given that a claim is not to be
13 narrowly construed in order to conform to an embodiment.

14 So then when it came time for summary
15 judgment, they argued the same thing again. Without
16 knowing where the wall stops and the bead starts, the
17 claim is indefinite. They said each claim requires
18 locating these two points. And during the *Markman*
19 process, the Court declined to adopt our more specific
20 definition and because of that, the claims are fatally
21 indefinite. They moved for summary judgment that the
22 claims were invalid. We cross-moved for summary
23 judgment that the claims were definite. And they lost
24 and we won that issue.

25 Your Honor ruled that the Plaintiffs -- that

1 was Crown at that time, rather than the Defendant -- are
2 entitled to summary judgment on the question of whether
3 the pertinent claims are invalid for indefiniteness.
4 Now they're coming in and they're essentially making the
5 same argument. We need to know where the wall stops and
6 the bead starts or we don't know how to apply the claim.
7 They say in their brief precisely locating the point at
8 which the wall meets the bead is essential to
9 determining if a can end infringes or a prior art can
10 end invalidates. But this drawing that's on the screen
11 at slide 105 is their invalidity contention in this case
12 and similar to the invalidity contentions in the last
13 case. There, they point to the prior art can end in the
14 Toyo patent, the Japanese '323 patent. You can see from
15 the drawing that the bead is not angularly offset from
16 the wall, but they don't have any trouble applying the
17 claim there saying that there's the reinforcing bead on
18 the bottom right. They point to it. And they say
19 there's the second point. So when they want to find the
20 second point and they want to find the reinforcing bead,
21 they can find it.

22 So to argue that we need to have this new
23 construction because otherwise the claim can't be
24 applied is belied by their own claim construction
25 positions in this case which were identical -- which are

1 identical to the ones that were asserted in the last
2 case.

3 They say: Well, we have to impose this
4 angular offset requirement into the claims of the
5 patents in suit because the language appears in another
6 different patent from the same family, Crown's '041
7 patent. Now, in their brief, at page 27, they say, the
8 reason why we can look to what the claims say in this
9 '041 patent is because it, quote, "claims and
10 describes," unquote, the same invention that is asserted
11 in this case. But that violates the principle of the
12 *Modine* case and the other case we looked at this
13 morning, that different claims -- certainly in different
14 patents; even in the same patent -- presumptively define
15 different inventions.

16 The patent office in this case ruled that
17 the '826 patent claims were a different invention than
18 the '875 patent. And the patent office never rejected
19 the '041 patent that came later because it claimed the
20 same invention as the invention claimed or described in
21 the '826 and '875 patents. When the patent office
22 thinks that somebody's trying to get two patents on the
23 same invention, there's a rejection that the patent
24 office issues called double patenting. There was never
25 a double patenting rejection in the '041 patent where

1 the government is saying you can't have the '041 patent
2 because it's already described in the '826 and '875
3 patent. So the premise by which we look at the '041
4 patent because it's supposedly the same invention as the
5 patents in suit is false.

6 In addition, the term "angularly offset" in
7 the '041 patent is expressly included in hoc verba in
8 the claims of that patent themselves. So it's right in
9 the claim. The term "angularly offset" is not in the
10 claim of either of the two patents that are involved in
11 this suit. And furthermore, the term "second point,"
12 "second location," or "transition" which give rise to
13 this issue and which Ball says mean angularly offset do
14 not appear in the '041 patent claims. So the claims of
15 the two patents, the '041 on the one hand and the '826
16 and '875 patent on the other hand, use different
17 language.

18 Ball cites and relies upon *Microsoft versus*
19 *Multi-Tech*. That case holds that where two patents in
20 the same family have a common claim term and where that
21 common claim term has been construed by the patentee one
22 way in one of the patents that that construction can be
23 imported into the other patents in the family. But that
24 case doesn't apply here because the same claim terms are
25 not found in the '041 patent as are found in the '826

1 and '875 patent.

2 So, the *Albany Molecular versus Dr. Reddy*
3 case, 2010 U.S. District LEXIS 59236, District of New
4 Jersey draws that distinction. It says: "While the
5 prosecution history of one patent is relevant to an
6 understanding of the scope of a common claim term,
7 citing *Microsoft versus Multi-Tech*, no such common claim
8 term is present in this case. The prosecution histories
9 at issue do not relate to a common claim term.

10 That's the situation that governs here. The
11 *Albany* case is our situation. The *Multi-Tech* case,
12 *Microsoft Multi-Tech* is a different situation.
13 Similarly, in *Liebel-Flarsheim versus Bedrad*, from this
14 district, 2005 U.S. District LEXIS 25733, the Southern
15 District of Ohio said: "When multiple patents derive
16 from the same initial application, the prosecution
17 history regarding a claim limitation in any patent that
18 has issued applies with equal force to
19 subsequently-issued patents," -- but here's the crucial
20 language -- "that contain the same claim limitation."
21 These patents, the ones that are asserted, do not
22 contain the angularly-offset limitation. It would be
23 error to read that limitation into claims that do not
24 have it.

25 Now, the second point, second location, and

1 second location on said wall that forms a transition
2 with said reinforcing bead, that appears in claims 1, 13
3 and 14 of the '826 patent, claims 32 and 45 of the '875
4 patent, and claim 14 of the '875 patent, respectively.
5 Crown's position is we don't need to construe those
6 terms any further because they're defined in the claim
7 itself.

8 So if we take a look at claim 14 and 13 of
9 the '826 patent, the patent refers to the second point
10 as the point that forms the lowermost end of the wall,
11 which is what the Court ruled in its prior construction
12 of the claims in the last case. Similarly, in claim 32
13 and dependent claim 45, the "second location" is defined
14 as a second location on the can end wall being the
15 lowermost point on the wall.

16 And finally, in claim 14 of the '875 patent,
17 the "second location" is defined in the claim itself as
18 the point that forms a transition with the reinforcing
19 bead. So, our position is that these claim terms do not
20 need further construction because it's clear what is
21 meant by the terms when they're read in the context of
22 the claim itself.

23 Turning to "transition therebetween." This
24 is a term that the Court construed in the last case, a
25 place between them at which one changes to the other.

1 That's the construction Crown suggests the Court should
2 adopt again. Ball again would read that limitation --
3 read into that limitation the idea of angular offset
4 from the annular reinforcing bead.

5 Nothing in the term "transition," if you
6 start from the words of the claim, would connote an
7 angular offset. Again, this issue was raised below.
8 There Ball argued -- when I say below, in the last case.
9 There Ball argued, just as they do here, we need to know
10 where the wall stops and the bead starts or we can't
11 apply the claim. There, they said: Defendant -- in
12 contrast your Honor wrote that the Court must construe
13 "transition" to mean a sharp, distinct, definable
14 non-gradual borderline that appears as a sharp point in
15 cross-section. They argued -- similarly, Defendant
16 argues that its proposed construction must be adopted
17 because claim 50 does not meaningfully explain where the
18 wall of the can stops -- can end stops and the
19 reinforcing bead begins. It's essentially the same
20 argument that Ball is making today.

21 In that case, the Court rejected their
22 argument and said given that Plaintiff's construction,
23 Crown's construction is consistent with the plain
24 meaning of the word "transition" and the drawings of the
25 patent, the Court will adopt the same. So, when Ball

1 says they want to stay true to the Court's prior opinion
2 this is a case where they're straying from the Court's
3 prior opinion.

4 And again in the last case, they said that
5 the Toyo claim anticipated claim 50, Japanese patent
6 '323. They said it had a transition, even though Toyo
7 didn't show an angular offset with a reinforcing bead.
8 In the prior case, they said: We don't need to
9 know whether -- even if there's no angular offset
10 between the wall and the bead, we sure know how to find
11 where the transition is.

12 The Court found that Toyo anticipated claim
13 50, and that would imply to me that the term "angular
14 offset" was not required because Toyo didn't show an
15 angular offset. Crown then appealed that ruling and the
16 federal circuit reversed the anticipation ruling but
17 with no discussion of Ball's then secret angular offset
18 limitation which they're espousing here.

19 Even today in their claim construction -- or
20 pardon me -- their claim application to the prior art
21 infringement contentions, looking at slide 117, they
22 continue to allege that claim 50 is anticipated by Toyo.
23 They have no trouble pointing to the transition and no
24 trouble pointing to the reinforcing bead. And so they
25 can apply this claim when they want to. It's they don't

1 like the way the claim is otherwise applied when it's
2 applied for purposes of infringement. But what's sauce
3 for the goose is sauce for the gander.

4 Turning to the portion of the "wall" term
5 group. These are terms 13, 14, and 15, again taking the
6 numbering from Ball's brief. Again, Crown's view is
7 these terms don't require construction because the
8 meaning of the term is, they're self-defined, these
9 terms are self-defined in the claims themselves.

10 Now, in the last case, the Court construed
11 one of those terms in claim 50. The Court construed the
12 entire phrase. The phrase that was construed was: Bend
13 a portion of said can end wall upwardly around said
14 junction of said chuck walls. The Court construed that
15 language and used the term "portion of said can end
16 wall," which is what Ball's trying to read here or have
17 construed here. The Court used the same term in its
18 construction as is found in the claim. So the Court
19 read that entire phrase such that this portion of the
20 can end wall was self-defining because it used the term
21 "portion of said can end wall" in the construction
22 itself. So, that demonstrates that this claim didn't
23 require construction before and it doesn't require, in
24 our view, construction now.

25 The real reason is because the meaning of

1 that portion of said can end wall is right in the claim.
2 A portion of said can end wall is a part of the can end
3 wall that is bent upwardly around the juncture of said
4 chuck walls at a first location on the can end wall.
5 That comes from claim 50 of the '875 patent.

6 Similarly, in claims 14 of the '826 patent
7 and claims 14 and 32/45 of the '875 patent, the term
8 "first wall portion or a portion of said first wall
9 portion" are defined, self-defined in the claim itself.
10 If we look at claim 14 of the '826 patent, we see that
11 the first wall portion is a part of the can end wall
12 that is, quote, "adapted to be formed during said
13 seaming operation so as to be bent upwardly around said
14 junction." And in claim 14 of the '875 patent, it's a
15 part of the can end wall that, quote, "after seaming is
16 substantially cylindrical." So the claims are defining
17 in the words of the claim what is meant.

18 Finally, in claim 32, from which claim 45
19 depends, that's in the '875 patent, a portion of said
20 first wall portion is a part of the first part of the
21 can end wall. That is to use the words of the claim,
22 pressed against the chuck first wall and bent upward
23 through an angle of at least 16 degrees. So, again, the
24 construction comes from the language of the claim
25 itself.

1 Now, Ball comes along now and their position
2 is, we have to define this portion of the wall as the
3 straight upper portion that is not substantially
4 cylindrical, paren, i.e., is inclined at an angle of at
5 least 20 degrees before seaming.

6 We take issue with that for a number of
7 reasons. First, let's focus on the straight upper
8 portion.

9 Now, the Court ruled that there was a
10 disclaimer. It ruled that the upper portion of the can
11 end wall had to be bent upwardly more than ten degrees
12 during seaming. We thought we knew how to measure that
13 angle and we measured it in the last case and the Court
14 ruled ultimately that the way our expert measured it was
15 different from the way it had been mentioned in the file
16 wrapper. So the Court ruled that we had to look at the
17 straight portion of the can end wall to determine
18 whether it was bent upwardly ten degrees. That would
19 ultimately resolve the first case. But the Court didn't
20 rule that the entire can end wall had to be straight.

21 It doesn't have to be straight. We know
22 that the can end wall needn't be flat. It doesn't have
23 to be flat. We know that from the *Anheuser Busch versus*
24 *Crown* case where the federal circuit refused to read the
25 can end wall as being an entirely flat or straight

1 surface. We know that the straight part has to be bent
2 upwardly more than ten degrees. Your Honor has ruled
3 that in the last case. But that doesn't mean that the
4 entire wall needs to be straight.

5 In fact, if we look to figure 4 of the
6 patent, we see -- and we looked at this drawing
7 earlier -- we see that the can end wall at the top has a
8 little curved portion, a radiused portion, as it's
9 referred to in some of the claims of the '875 patent.
10 So while the wall that -- the straight part has to be
11 bent upwardly ten degrees doesn't mean the wall itself
12 must be straight or flat. It would be error to read
13 that into the claims. That's the very error that caused
14 the reversal in the *Anheuser Busch versus Crown* case.

15 A construction that excludes the preferred
16 embodiment is rarely, if ever, correct. That's from the
17 *Rexnord case versus Laitram* and a construction that
18 would preclude the claim from reading on figure 4 of the
19 patent which shows a flat chuck wall with a curved
20 portion would not be correct.

21 The second problem we have with Ball's
22 construction is they say: Well, the portion that's bent
23 upwardly, the portion of the can end wall that's bent
24 upwardly must not be substantially cylindrical. We
25 don't take issue with that. What we do take issue with

1 is that, quote, "corollary," unquote, that Mr. Luken
2 spoke about because Ball's construction says: In order
3 to be not substantially cylindrical, the wall portion
4 must be inclined at an angle of at least 20 degrees
5 before seaming. Nothing in the language of these
6 phrases, "portion of said can end wall," "first wall
7 portion," or "portion of said first wall portion" states
8 or implies that the wall before seaming must be inclined
9 at an angle of at least about 20 degrees.

10 Now, Ball says in their brief that the
11 reason why they say the wall must be 20 degrees before
12 seaming, the upper part of the wall, is because of the
13 disclaimer that your Honor found and as to which you
14 were affirmed by the federal circuit. They say: As
15 required by the disclaimer, the upper portion of a can
16 end wall must be inclined at an angle of 20 degrees or
17 more in order to be bent more than ten degrees and
18 become substantially cylindrical during seaming.

19 So we've shown here a chuck. Shown in
20 yellow on slide 132. And the chuck has a four-degree
21 angle, plus four degrees. And the wall has a 20-degree
22 angle before seaming. So if the wall is bent upwardly
23 against the chuck, it's deflected 16 degrees from plus
24 20 to plus four. So if the requirement of the claim is
25 that the can end wall must be bent upwardly more than

1 ten degrees, it would seem, at first glance, that this
2 wall would satisfy that claim limitation. It's bent
3 upwardly more than ten degrees.

4 But Ball says no, it's not. It's not
5 because there is something called springback. If the
6 wall is bent upwardly and is bent against the chuck, and
7 then the rolls are removed, metal has some memory to it
8 and it springs back a little bit. And so they say well,
9 if it's bent upwardly, starts at 20 and it's bent up to
10 four, it springs back five, and so instead of going from
11 20 to four and to flex 16 degrees, it bends from 20 to
12 four and then springs back five. So it's really only
13 deflected 11 degrees. So they're making a factual
14 assumption that your Honor's disclaimer ruling required
15 springback and required that that springback be
16 considered. They're also assuming that the
17 springback -- they're making a factual assumption that
18 the springback must be five degrees.

19 Finally, they're making the assumption that
20 the wall of the chuck must be plus four degrees. All of
21 those factual assumptions they're asking to be buried
22 into this claim construction, and we submit all of them
23 would lead to error, and all of them are fact issues
24 that need to be resolved at some point but certainly not
25 in the context of a *Markman* hearing. So let's consider

1 each of those assumptions and why they're unfounded.

2 They assume there must be springback, but
3 the Court's prior construction order said nothing about
4 the wall having to start at 20 degrees and it said
5 nothing whatever about springback. Your Honor found
6 that Mr. Higham's declaration in the patent office
7 demonstrated that Plaintiffs disclaimed that the upper
8 wall portion of the can end wall was altered by bending
9 no more than about ten degrees. That was the ruling.

10 So if we go back and look at Mr. Higham's
11 declaration upon which the disclaimer was found, we see
12 that Mr. Higham didn't say anything about 20 degrees.
13 He didn't say anything about springback. All he said
14 was that the can end was bent more than ten degrees
15 during seaming. So he was talking about -- in his
16 statement to the patent office, he was saying in the
17 prior art, the wall angle started at around 14 and was
18 bent to around four, for a deflection of about ten
19 degrees. And he wasn't referring to what happened after
20 seaming, after the metal relaxed. He was talking about
21 what happened during seaming. You can see that from his
22 declaration. Paragraph 5, Exhibit 6 to Ball's brief.

23 If you look at the claim language of the
24 various claims at issue, you'll see that what's being
25 referred to in the claim is what happens during seaming,

1 not what happens after seaming. If we look at the '826
2 patent claim 13, it uses the word "deformed during said
3 seaming operation." It's not talking about deformation
4 after the metal relaxes and the rolls are pulled away.

5 In the '875 patent, claim 32 and 50, we're
6 talking about what happens in the seaming operation as
7 the operation is being performed, not what condition
8 does the metal have after the seaming is complete.

9 Now if, and this is a big if. If the
10 Court's disclaimer was taking springback into account,
11 then the disclaimer would not have been ten degrees as
12 the Court found it was. If we're looking at the
13 deflection, the net deflection of the can end wall, it
14 starts at, say, 14, it's bent upwardly four degrees and
15 then it's bent back -- then it springs back five
16 degrees. If that's what the Court was talking about,
17 then the net deflection of the wall would have been 14
18 to nine and the disclaimer would have been five degrees,
19 not ten degrees.

20 So it's very clear from the Court's ruling,
21 which was affirmed on appeal, that what is being
22 referred to here does not take into account springback.
23 That's consistent with the language of the claim that's
24 talking about what happens during seaming.

25 Next, they say: Well, if we take springback

1 into account, we've got to assume it's five degrees
2 because Mr. Fields had a declaration in the patent
3 office in which he talked about a five-degree
4 springback. But he wasn't talking about the invention.
5 He wasn't talking about the accused product. The amount
6 by which the metal springs back after seaming is
7 dependent upon the geometry of the end, the stiffness of
8 the metal, none of which have a universal applicability
9 such that we could say that springback must be five
10 degrees.

11 Lastly, Ball assumes that the chuck must
12 have a plus four-degree angle but the specification
13 specifically says that the substantially cylindrical
14 surface of the chuck may be inclined at an angle between
15 plus four degrees and minus four degrees. So let's see
16 what that means.

17 Let's look at slide 141. If we look at a
18 chuck with a plus four-degree angle and we start out
19 with a 20-degree wall and even if we take springback
20 into account, there's a net deflection of 11 degrees
21 which would suggest that such a wall is within the scope
22 of the claim.

23 But let us suppose that instead of a plus
24 four-degree wall the chuck had a zero-degree wall which
25 is contemplated by the patent explicitly. If the chuck

1 has a zero-degree wall and the wall of the can end
2 starts at 16 degrees, there's again -- even if we take a
3 five-degree springback into account -- that wall still
4 deflected 11 degrees, which is within the scope of the
5 claim.

6 And lastly, if the chuck has a minus
7 four-degree wall, which again is explicitly contemplated
8 by the patent and even if we assume there's five degrees
9 of springback which has nothing whatever to do with the
10 disclaimer -- you could start with a 12-degree wall,
11 bend it to minus four and let it spring back five
12 degrees and it would still be deflected 11 degrees,
13 which again is within the scope of the claim. So the
14 wall doesn't have to be 20 degrees before seaming in
15 order to satisfy the claim. What happens is the wall
16 not be substantially cylindrical before seaming, that it
17 be substantially cylindrical after seaming, and that it
18 be deflected during seaming by more than ten degrees.
19 So reading this 20-degree limitation into the claim is
20 error and is not required by the disclaimer that your
21 Honor found in the last case.

22 I'm going to turn over the last couple terms
23 to my partner, Mr. Murphy.

24 THE COURT: All right, sir. Mr. Murphy.

25 MR. MURPHY: Thank you, your Honor. For the

1 last group of terms from terms 16 to 23, a lot of the
2 arguments are repetitive from what we've already seen
3 and a lot of the law that's relied upon is repetitive
4 from what we've already seen. So I'm not going to dwell
5 very long on some of the issues. I'll try to highlight
6 anything that's new.

7 All right. Starting out with the Second
8 Portion group. There's two terms here. One is "second
9 portion of said wall." One is "second wall portion."

10 When Mr. Luken discussed these terms, he
11 said the problem is that with Crown's construction is
12 that they're not specific enough. It's not enough to
13 clarify that the wall we're talking about is the can end
14 wall because these constructions offered by Crown invite
15 the jury to go all over the place. But Crown submits
16 that that's not the case because when you read these
17 claim terms in the context of the claims themselves, you
18 see that the claim terms are defined by the claims
19 themselves.

20 So for example, in claim 14, the "second
21 portion of said wall" is defined as -- it's defined as
22 the second part of the can end wall that is extending
23 from the first point to a second point.

24 Very similarly, here in claim 14 of the '875
25 patent, the "second wall portion" is defined as the part

1 that's extending from the first wall portion at the
2 first wall location to a second location on said wall
3 that forms a transition with the reinforcing bead.

4 And again, this same similar claim term in
5 claim 32/45 of the '875 patent is defined by the claim
6 itself as the part that extends from the first wall
7 portion at the first wall location on the wall to a
8 second location on the wall.

9 Now, Ball offers these claim constructions
10 for these terms. They say what we have to do is we have
11 to add -- that it's the part of the wall engaged by the
12 frustoconical drive surface of the chuck.

13 We know that these constructions are wrong
14 because when we look at the claim itself we see that the
15 claim does not require any kind of engagement with the
16 chuck. It certainly doesn't require that the chuck be
17 frustoconical.

18 In particular, if you look at the '875
19 patent, claim 32 you see that in the claim language, it
20 says bring the chuck into engagement with the can end.
21 It doesn't say bring the chuck into engagement with the
22 wall. It doesn't say that the chuck has to be
23 frustoconical.

24 If you look at one of the unasserted
25 dependent claims in claim 42, you can see in the

1 underlying language that it does -- the claim does talk
2 about the chuck wall juncture being brought into
3 engagement with the can end wall. It's not just the can
4 end. The can end wall. This is an unasserted dependent
5 claim.

6 Similarly, in a different unasserted
7 dependent claim, you have the limitation that the wall
8 is substantially frustoconical. The point is that when
9 there are dependent claims that have the limitations
10 that are being purportedly read into an independent
11 claim, you know that's a problem. The federal circuit
12 law on this area, it's called the Doctrine of Claim
13 Differentiation. We cite the *Nazomi* case as an example.

14 Now, turning away from the wall and turning
15 back to the chuck, the next group of terms have to do
16 with the first and second circumferentially extending
17 walls of the chuck.

18 Now, here there's one claim term that was
19 previously construed by the Court. That's the first and
20 second circumferentially extending walls of the chuck
21 and then there's the first wall and second wall, sort of
22 versions of those terms.

23 Crown contends that construction of these
24 terms is not necessary. Now, we understand that the
25 Court's construction in the first case was that it means

1 first and second encircling distinct, discrete and
2 discernibly separate side surfaces of the chuck. Crown
3 continues to urge its original position sort of by way
4 of preserving its original position which is necessary
5 but nonetheless we appreciate that that was the original
6 construction.

7 Now, Ball was not satisfied with the
8 original construction either. They've offered a new
9 construction. Here, the easiest place to see it is in
10 term 18 where it says: First and second
11 circumferentially extending walls of the chuck. And
12 Ball inserts the additional limitations basically that
13 the first wall has a substantially cylindrical surface
14 and the second wall has to have a frustoconical drive
15 surface and the slope of the frustoconical drive surface
16 has to be substantially equal to that of the can end
17 wall. Then the other two terms just have the two parts
18 of that construction, accordingly.

19 So let's take a look at this. In the
20 previous case when it came time for claim construction,
21 Ball urged the construction that there have to be these
22 two distinct, discrete, discernibly separate side
23 surfaces and that the Court accepted. But they also
24 said on top of that, that the surfaces have to have
25 decidedly different geometrics and angles which are flat

1 in cross-section. Now, notice that they didn't ask for
2 substantially cylindrical and they didn't ask for
3 frustoconical drive surfaces.

4 The Court decided to give Ball the first
5 part of this construction and not the second. Now, Ball
6 has returned and said: Well, let's ask for a different
7 second part of this construction. But for exactly the
8 same reasoning that the Court decided not to give Ball
9 the latter part of this construction the first time,
10 they should once again not do that.

11 Just as in the previous example, an
12 examination of the dependent claims supports this
13 reasoning of Crown's. You can see that claims 59 and 60
14 provide the specific limits that the first wall be
15 substantially cylindrical and that the second chuck wall
16 be substantially frustoconical. It would be error to
17 incorporate those limitations of the dependent claims
18 into the independent claim, again under the doctrine of
19 claim differentiation.

20 Now, when it comes to '875 patents claims 14
21 and 32 in the first circumferentially extending wall,
22 there's a slightly different problem. If you take this
23 claim construction that's being offered, substantially
24 cylindrical, and you insert it into those claims, what
25 you find out is that those claims already had a

1 requirement of that wall being substantially cylindrical
2 and so you get a redundancy.

3 And you might wonder: Why would Ball offer
4 redundant claim construction? It's not so much that
5 this claim construction needs to say "substantially
6 cylindrical" twice. It's really just symptomatic of an
7 attempt to graft wholesale the limitations of the
8 specification into all of the claims which sometimes
9 results in this type of duplication.

10 Finally, the second circumferentially
11 extending wall of the chuck which isn't exactly as
12 printed in claim 50, but the second portion of the wall
13 is there. There, you have exactly the same issues with
14 the frustoconical drive surface and the slope
15 substantially equal that you had with term 18 which I
16 already discussed.

17 Again, federal circuit case law says that
18 you're not supposed to read these limitations from the
19 specification into the claims.

20 Now, the last three claim terms Ball
21 addressed together. They're called the deforming claim
22 terms. I'm going to take one at a time, if briefly.

23 The first is "adapted to be joined." Crown
24 offers a pretty simple claim construction for this.
25 "Adapted" just means designed or configured to. It

1 means sort of capable. This is a relatively common term
2 in patent parlance, especially for claims on objects,
3 things, products, machines because sometimes you want to
4 describe, you want to claim a capability of that thing.
5 There's lots of different ways that claim could be met
6 in practical purpose. There's quite a bit of federal
7 circuit and District Court case law explaining that
8 "adapted to" is the sort of standard claim language, and
9 it means configured to.

10 But what Ball has done is said we should
11 take this "adapted to be joined" language and we should
12 use it as a way to insert a variety of other
13 limitations. Let's take a look at some of these.

14 First of all, let's go back to the claim
15 language. For example, claim 13, here you see how
16 "adapted to be joined" is used in the claim. It says a
17 metal can end for use in packaging beverages under
18 pressure and adapted to be joined to a can body by a
19 seaming process. The question is the can end has to be
20 designed in a certain way that makes it susceptible to
21 being joined. Now, does it have to be -- in order for
22 it to susceptible to being joined in accordance with
23 this aspect of the claim, does it have to have a
24 straight upper portion, does it have to have a 20-degree
25 angle before seaming, does it have to be substantially

1 cylindrical after seaming and so on? No, that's not
2 what the claim says. It shouldn't be read into the
3 claim.

4 The can end claim is a claim on an end,
5 especially when it comes to claim 1 of the '826 patent.
6 That claim on a can end does not incorporate the method
7 of seaming into the claim. And it's certainly fair
8 enough to say that the Court's disclaimer order,
9 disclaimer ruling should be incorporated into the method
10 claims that talk about deforming the can and so on, but
11 claim 1 of the '826 patent, as is laid out in Crown's
12 briefing, is really a bit of a different ball of wax.
13 It is a product claim that doesn't incorporate the
14 method.

15 When you go back and you examine the
16 prosecution history, again it's laid out in the
17 briefing, I think the resulting -- the result of that
18 analysis is that the nexus between that claim and the
19 supposed disclaimer doesn't reach the high bar of the
20 *Omega* case in the federal circuit and other similar
21 cases that say what it takes to have a disclaimer.

22 Even above and beyond the disclaimer,
23 there's nothing in the "adapted to be joined" language
24 that makes it reasonable to incorporate a straight upper
25 portion in the 20-degree angle and the substantially

1 cylindrical after seaming and so on.

2 Term 22 is a deforming claim limitation.
3 Here, the claim constructions are fairly long. But
4 really we can skip through everything and just focus on
5 this one difference between Ball's and Crown's
6 construction. It's laid out here. I've highlighted in
7 pink the important difference.

8 Ball wants to add this additional limitation
9 that in this deforming step there has to be bent
10 upwardly around the juncture of the chuck and against
11 the first chuck wall. The reason we know this
12 additional limitation is not called for and doesn't work
13 in this claim is that the claim doesn't even require a
14 chuck wall with a junction. So how can you have bending
15 around the juncture of the chuck wall if it's not even
16 in the claim? Instead, the claim simply provides
17 rotatable chuck comprising this first circumferentially
18 extending wall, and that first wall is substantially
19 cylindrical. But it doesn't provide for the juncture.
20 So how can you add on an additional limitation of
21 something happening around that juncture?

22 Finally, this claim term which I think, as
23 Mr. Luken pointed out, limits the bending to 16 degrees
24 which is different and -- different in scope than the
25 Court's disclaimer. Once again, the two parties'

1 constructions are very similar except again the one
2 exception is the same which is that Ball wants to add
3 this bending around the juncture of the chuck. The flaw
4 here is exactly the same as in the last case which is
5 that claim 32 doesn't require a chuck with a juncture.
6 If there's no chuck with a juncture in the claim, how
7 can there be bending around that non-existent juncture?

8 This is just a good time to remind the Court
9 that the federal circuit case law is that when you have
10 these claims of slightly different scope and using kind
11 of similar terms, there's a presumption that the
12 different scope is intended. There's a reason that
13 these claims have a different scope. That leads me to
14 my conclusion that the problem throughout Ball's claim
15 construction position is it kind of starts from a flawed
16 premise. Ball's premise here is that all the claims are
17 directed to a single uniform invention. There's one
18 invention. What that is it's the preferred embodiment.
19 Crown's premise is that the claims mean what they say.
20 Each one of these claims was crafted to mean something
21 specific. The words mean what they say.

22 The approach that Ball took is at first you
23 look at the drawings and the specification. It's pretty
24 clear from reading the briefing and watching the
25 presentation that that's what they start with; the

1 drawings and the specification. They kind of devise an
2 ideal claim from their point of view that incorporates
3 all possible limitations. Once you've done that, find a
4 place to put each of those limitations in each asserted
5 claim so that way all the claims are the same and
6 they're all limited to the preferred embodiment, but
7 that methodology is not allowed under federal circuit
8 law.

9 One of the reasons Ball says it's necessary
10 to do it this way is that we have to clarify the
11 situation for the jury, but their methodology actually
12 sews confusion. Number 1, it inserts duplicative and
13 redundant limitations within a claim.

14 Number 2, it renders whole claims completely
15 redundant by violating claim differentiation principles.

16 And number 3, it creates claims that have
17 simply impossible-to-follow grammar.

18 And number 4, it adds these long complex
19 phrases in place of the short terms that are
20 self-defined within the claims. None of that is going
21 to help the jury in addition to running contrary to
22 federal circuit law. Thank you.

23 THE COURT: Thank you, Mr. Murphy. Give me
24 one moment.

25 Crown has utilized its hour and 40 minutes.

1 Mr. Luken, you have, if you wish, some 27 minutes left.

2 MR. LUKEN: Judge, I appreciate the
3 additional time. I've been warned in the sternest terms
4 by both Mr. Lorentz and Miss Rodman that I should not
5 use 27 minutes here. While I frequently ignore what Mr.
6 Lorentz tells me, I try to do what Miss Rodman tells me.
7 So I'm going to do my best to leave a little bit of time
8 in the bank, although I confess, sometimes I get carried
9 away.

10 THE COURT: All right.

11 MR. LUKEN: There were, I think, about a
12 hundred and 70 pages on the PowerPoint that I'm
13 responding to. I'm certainly not going to touch
14 everything there. Our briefs go into much of the
15 detail.

16 I'm not sure if your Honor is going to
17 accept any post-argument briefing. Last time I think we
18 did two rounds. We certainly don't need two rounds, but
19 maybe one short one and a couple weeks might be useful.
20 That's obviously your call.

21 First point, in the briefing last time, we
22 and I were chastised by Crown for putting up the accused
23 end and for talking about things other than claim
24 construction. So I'm not going to respond to most of
25 the first ten to 12 minutes of Mr. Heist's presentation,

1 which were a fairly one-sided and incomplete story of
2 the history of how we got here going back to dealings
3 with other can makers and things like that. Suffice it
4 to say that none of that has anything at all to do with
5 claim construction.

6 There was also a suggestion, I heard words
7 like "didn't reveal" and things like that. The part of
8 the record I would like to set straight, which is
9 entirely consistent with what your Honor, Mr. Heist and
10 I discussed by phone on the first case on an afternoon
11 in November, I believe it was 2011 when they filed that
12 motion. I advised the Court -- I learned a little more
13 about it; we were moving rather quickly then -- I
14 advised the Court that there had been a change in how my
15 client made the end. It was in the tooling that stamps
16 these things out. There was not a redesign of the end
17 to try to make the angle go from well within ten degrees
18 to outside of ten degrees. We may be naive, but we're
19 not that naive. There was an attempt to make this end
20 more consistently to improve productivity, to improve so
21 that the downtime of changing out tools wouldn't be as
22 much so that one end to the next matched more perfectly,
23 and this part of the can end wall is not something
24 that's in the Ball specification. It's something that
25 became important because of your Honor's ruling and the

1 file history in the case. But it is not one of the
2 angles that in the specification it was called out.

3 When Crown filed that, your Honor will
4 remember that I specifically acknowledged that there had
5 been a change, and I said, specifically in one regard.
6 And I was talking about this one.

7 Mr. Heist may think his case gets better.
8 All three of us discussed: What do we do about that? I
9 proposed -- discovery in that case has gone on with the
10 original end, and I proposed that your Honor rules on
11 the original end. Then depending on your Honor or if
12 the case ended if Crown wants to -- if they want to
13 accuse us of infringing on the modified end, your Honor
14 could either include that in the existing case, throw
15 open discovery, or could rule and then later a second
16 case, if necessary, could address it. That was my
17 proposal: Rule on the existing case. Rule on the
18 existing end that has already been the subject of
19 discovery and briefing.

20 Your Honor -- we were on the phone so you
21 didn't turn to Mr. Heist. Your Honor said: Mr. Heist,
22 is that acceptable? Mr. Heist said yes. That's how we
23 got here today.

24 When your Honor ruled in our favor, I don't
25 think I was out of line to assume that we were about to

1 get accused -- with the modified end, the inadvertently
2 modified end -- of infringing because, as your Honor
3 notes, from the beginning of my presentation that they
4 just didn't send the same four claims after us this
5 time. They've got 25. The fact that we filed the DJ to
6 keep that dispute in front of your Honor, who is
7 familiar, probably more familiar than you would ever
8 want to be with these issues, but is familiar with these
9 issues, I think was entirely appropriate. The
10 suggestion that there was anything improper about what
11 went on then, it's just wrong. If I'm taking that
12 suggestion and it wasn't intended, I apologize.

13 With respect to the claim construction, Mr.
14 Heist may not be far off when he said we're ships
15 passing in the night on some issues, but I don't think
16 our position -- I know our position is not the
17 caricature that Mr. Heist outlined. We are not trying
18 to take every limitation that's anywhere in the
19 specification and fit it into the claim construction
20 somewhere. Far from it. Your Honor can read the
21 specification here and find that there's lots of things,
22 there are many angles -- and Mr. Heist pulled one of
23 them out today. There are many angles in here. There
24 are many pieces of structure in here. There are many
25 examples that we are not calling on.

1 The bedrock principle that you did not hear
2 refuted this morning in the Crown presentation -- I
3 agree *Phillips* says look at the claims. *Phillips* also
4 says look at the specification. And the cases since
5 *Phillips* make it abundantly clear you cannot claim more
6 than you invented.

7 While I understand that we cannot limit them
8 to the preferred embodiment, your Honor has been down
9 this road before, in finding a disclaimer, in finding
10 that the can end wall has a single surface. Whereas the
11 chuck walls have two walls with two distinct and
12 discernibly different surfaces. Crown's difficulty is
13 they only disclosed one invention. They can talk about
14 multiple embodiments and preferred embodiments all they
15 want, but their inventions require these elements that
16 your Honor has already construed the claims to include.

17 What we're doing here, while we are asking
18 for more clarity in certain areas, we are not, by any
19 means, pulling a wholesale importation of the entire
20 specification. That's a red herring that is being
21 refuted.

22 With respect to the claim language itself,
23 and I will again not go back in and put all of those
24 little charts -- we're going to hand up a copy of our
25 PowerPoint at the end. I assume Crown is too. But

1 remember in those charts where we took every group of
2 terms and we put the word side by side by side by side.

3 Mr. Heist basically said because one of them
4 says first point and the other says first location
5 you've got to construe them differently because they use
6 different words. That may be a cheap example of it, but
7 frequently when those words are saying synonyms but
8 using different language, Mr. Heist wants you to give
9 the jury different claim constructions for them. You
10 did not hear any suggestion that they're pointing to
11 different parts of the can end. The can end wall is the
12 can end wall, whether we're in claim 50 of the '875 or
13 we're in claim 13 and 14 of the '826. The chuck is the
14 chuck all the way through. And that's what our claim
15 constructions are asking you to do.

16 It's curious that having accused us of
17 wholesale importation of limitations from the
18 specification, Crown exercised a fairly recent example
19 of that in order to try to change your Honor's
20 disclaimer ruling. I'm speaking specifically of the
21 upper can end wall and the cover hook.

22 If we could -- just so I can place this, if
23 you could put up, say, maybe number 39 -- or I'm sorry
24 80. Actually, 62 would be better. I am going to use up
25 all my time just because I can't figure out which slide

1 I want to look at. Okay. Can we go full screen? All
2 right.

3 Your Honor, remember that what we're
4 talking about here is where the upper can end wall ends,
5 where the cover hook begins and thus where that first
6 point is in claim '826 and what are you measuring when
7 you decide whether there's been ten degrees of bending?
8 The upper can end wall, which you've already decided in
9 the summary judgment motion.

10 We put that first point at the same place
11 that -- the upper can end wall, the boundary of the
12 upper can end wall shown here is the first point. The
13 upper of the two dots. That's the top of the can end
14 wall.

15 Mr. Higham in the summary judgment briefing
16 tried to do exactly what Mr. Heist did this morning for
17 exactly the same reason. He pulled -- I'm told I
18 can't -- I'm going to walk over here because the pointer
19 doesn't work on the TV screens. He went and started to
20 go into the curved portion over here, which is clearly
21 the cover hook. Your Honor said no. The upper can end
22 wall that we're talking about here for the disclaimer,
23 that we're talking about here from the file history is
24 the straight upper portion of the can end. Mr. Heist
25 went on and on today about whether the entire can end

1 has to be straight. I'll come back to that. We're
2 talking about the upper portion of the can end and where
3 it abuts the can end wall. The border, if it's
4 curved -- where it abuts the cover hook. If you're
5 curved, you're in the cover hook. If you're straight,
6 you're in the can end wall.

7 What Mr. Heist is trying to do is precisely
8 what Mr. Higham did, which is he needed to get us above
9 13 degrees, as your Honor will recall. So he moved it
10 out here to get it to 23. He just took this point and
11 slid it. He pivoted our angle. He got it to a higher
12 point. He didn't just do that randomly. He went to the
13 same part of the specification that Mr. Heist quoted
14 today. He went to the chart that's on the bottom of
15 columns two and three that gives some examples of
16 experimentation that Crown did. There's a spot there
17 that says seaming panel, says chuck wall radius, which I
18 would suggest to your Honor precisely is the radius in
19 the cover hook next to the can end wall. He took that
20 radius and -- he didn't give it all to the cover hook.
21 He didn't give it all to the can end wall. He just
22 split it arbitrarily right down the middle. So he took
23 the radius that Mr. Heist was showing you this morning,
24 which is right here, it's the first curved part of what
25 should indisputably be the cover hook. Mr. Heist

1 eventually said he doesn't really have a problem with
2 the cover hook having the word "curved" in its
3 construction. He objected to it in both briefs. But I
4 guess the fact that that's exactly what he asked for,
5 what Crown asked for and what the District Court in
6 Delaware gave them, brought it around and that is the
7 curved end. The cover hook is curved.

8 Mr. Heist told you that this radius which is
9 called r1 or r2 in an obscure part of the specification
10 and has a name and a chart that has the word seaming
11 panel and -- or seaming panel and chuck wall in the name
12 so he stitches that together, and he's going to overrule
13 your decision in the summary judgment decision and say
14 that Mr. Higham really can take the can end wall and
15 catch -- take part of the cover hook and move it into
16 the can end wall. That's not right.

17 Your Honor, the very argument that Mr. Heist
18 advanced today using his r1 from the fine print at the
19 bottom of column 3 of the patent and imposing that on
20 figure 4 is exactly what Mr. Higham tried to do in the
21 summary judgment briefing and exactly what your Honor
22 rejected. That, your Honor, is importing limitations
23 from the specification to change the natural language
24 and to change the ruling that your Honor did before.

25 This is important not only because that

1 first point in claim 1 of the '826 is at a different
2 place than the first point in all the other claims
3 which, as an aside, is reason enough to be more specific
4 in your construction of the first point on the other
5 claims than you were last time. The last time the only
6 first point that was in play was the lower one here of
7 the two. Because claim 1 of the '826 was not an
8 asserted claim.

9 Now, you have first point, the same words in
10 two different places. It is inviting the jury to be
11 confused and it is inviting the experts to go off on a
12 frolic that is inappropriate. All you have to do is say
13 what you knew was the case in the first case but didn't
14 feel that you needed to clarify included in the claim
15 construction so the "first point" language doesn't
16 confuse anybody.

17 More importantly, this is important, where
18 the top of the can end wall is and where its border
19 where the cover hook is important because the disclaimer
20 that you found in the first case, that applies to their
21 invention. Not to one claim, not to another claim. And
22 throughout the presentation this morning, Crown was very
23 careful. They agreed to a very limited version of the
24 disclaimer, ten degrees of bending, and they agreed
25 exactly on the claims that were at issue last time, but

1 they did not admit that that's part of the new claims
2 that they've added this time and they especially argued
3 very hard about claim 1 of the '826. But the argument
4 that they used there is the same argument that was wrong
5 in the first case and it's wrong here.

6 They point out that the '826 is an end and
7 the '875 is a method of seaming. But as your Honor has
8 already held in doing the claim constructions and
9 analyzing the disclaimer, the '826 is an end that is
10 made to be seamed in a particular way and the '875 is a
11 method of seaming that uses a particular can end. The
12 invention is the same. They are the mirror of each
13 other.

14 So the disclaimer that your Honor found in
15 the first case applies to all of the claims. And if
16 there was any claim that that is abundantly clear, it is
17 claim 1 of the '826. Because as I said very hurriedly
18 at the end of my presentation this morning, claim 1 of
19 the '826 was the independent claim at issue when the
20 patent examiner during the '826 prosecution said, a can
21 end that has a large angled wall is not patentable. And
22 Crown came back with its arguments and with the Higham
23 declaration that your Honor relied upon. They were in
24 direct response to the rejection of claim 1.

25 The way they overcame that rejection is they

1 said it's not just a can end with a big angle. It's a
2 can end with a big angle that is seamed in a very new,
3 unique and particular way that is part of our invention.
4 That new, unique and particular way is the bending of
5 the upper part upwardly around the junction of this new
6 radically different chuck with its top wall that's
7 substantially cylindrical and its bottom wall that is
8 frustoconical and does the driving. You don't just
9 squeeze the end like in the prior art and move it a
10 little bit. You start with something that's a lot
11 bigger. You drive it down here. You've got that edge
12 that your Honor found, the juncture that's an edge
13 pressing right in there, like a fulcrum. You take this
14 thing and you bend it upwardly around. In the process,
15 it has to bend by more than ten degrees. It has to
16 become substantially cylindrical. The federal circuit
17 affirmed you on the first. Crown's never disagreed with
18 you on the "becoming substantially cylindrical." That
19 disclaimer unequivocally applies everywhere.

20 We have suggested, your Honor, in the
21 briefing that the place to, the way to apply it is
22 through the "adapted to be seamed" language that is at
23 the very beginning of claim 1 of the '826. If your
24 Honor doesn't want to attach it to that language, you
25 can simply reflect that the disclaimer applies but the

1 disclaimer applies. By adding new claims that weren't
2 in the case last time when your Honor found the
3 disclaimer, Crown does not get to avoid the -- when your
4 Honor found the disclaimer, Crown does not get to avoid
5 the disclaimer, particularly as to the very claims when
6 it made the statement.

7 Now, the upper wall portion, I think I've
8 covered this because we were talking about the first and
9 second points, the definition of where that first point
10 is, the definition of where the can end wall ends, the
11 definition of where the cover hook begins is what we've
12 been talking about here, that borderline between the
13 two. One is curved. The other is a single surface that
14 should pervade your Honor's construction of all three of
15 them.

16 Nicole, could I have, say, 67?

17 Your Honor, I'm now going to turn quickly to
18 the second point terms and to the angular offset
19 language that we've proposed.

20 I'm back -- I may have hurried through this
21 a little bit. This slide in red shows precisely where
22 that second point/second location is on the invention.
23 Let me just step back.

24 You can look in their briefs and they point
25 at exactly the same place. The structure above that is

1 unequivocally the can end wall. It's that single
2 surface. Mr. Higham says it doesn't have to be straight
3 because in a different case involving a different patent
4 with different claims, the '634, which that patent was
5 prosecuted before anybody had heard of the Japanese
6 reference that's the subject of the invalidity briefing
7 in this case that your Honor found actually anticipated
8 these claims. Maybe the federal circuit overruled that.
9 But where your Honor found that it had everything, I
10 think it's a very short step under 103 that it renders
11 it obvious. But in any event, that patent has never
12 seen the light of day since that case because that
13 patent is clearly invalid in light of the JP 323
14 reference that has been before your court and before
15 your Honor and will be.

16 More importantly, that's a non-precedential
17 decision that your Honor's not bound by. We weren't a
18 party to it, your Honor. So while Mr. Heist says that
19 you can have a can end that isn't precisely straight, I
20 don't think your Honor has to get into that today. But
21 there's no question that your Honor's held that it's a
22 single surface. So it sure doesn't have the two
23 distinct walls that the chuck has. That much is clear
24 and undisputed even though they told you that they
25 reserve the right to go upstairs and try to get you

1 reversed on that. They don't seem to be fighting it
2 very hard today.

3 So we've got a single surface on the can end
4 wall. We've got right below it -- I'm going over here
5 since my pointer won't work on the TV. We've got a
6 single surface on the can end wall which is this, which
7 is a clear single surface. We've got this thing right
8 below it is the reinforcing bead, which in the agreed
9 construction is generally U-shaped. The only embodiment
10 shown, the invention has a border between them. That
11 border, because this is defined by one geometry, single
12 surface, and the reinforcing bead below it is defined --
13 I'm hoping I'm not messing up the TV screen. I'll quit
14 tapping and just point.

15 And the surface below it, the reinforcing
16 bead, has a different geometry. There has to be
17 something that marks the difference. And the problem we
18 had in the first case, again without my corner I'm a
19 little helpless, Mr. Higham was putting his reinforcing
20 bead, his second point, his second location, the border
21 between the can end wall and the reinforcing bead up
22 here, up here, up here. He was taking part of this
23 single surface and slicing it in the middle and
24 arbitrarily giving part of it to the reinforcing bead.
25 When I pushed him on that in the deposition, he actually

1 said yeah, there's an infinite number of points here
2 that it could be.

3 The reason he could come up with an infinite
4 number of points, here, here, here, here, here, here,
5 any of which could be a reinforcing bead. He did have a
6 way of breaking a tie. We went to a computer model and
7 I was going to run it through the computer model and
8 estimate strength. You're not going to ask a jury to do
9 that. That's not a logical way of dividing -- of
10 distinguishing between two adjoining geometric shapes.
11 There's certainly nothing that Crown has advanced here
12 that would support that.

13 To prevent that kind of mischief, to prevent
14 that kind of opportunistic moving of things, to give the
15 jury some clarity, what your Honor needs to do, we
16 submit, and strongly request, is simply to say something
17 in the definition, in the construction either to say
18 where the can end wall ends or where the reinforcing
19 bead begins. So there's multiple places in the claim
20 construction you can put it. We put it on the second
21 point terms because that's the border that says angular
22 offset.

23 I agree, I recognize that Mr. Heist has
24 said: Hey, when we used the word "angular offset" in
25 that other patent, we were describing a claim. I

1 understand that. That's why this morning I said if your
2 Honor has another word for angular offset, I'm not
3 saying that that exact phrase is the only word you could
4 use. I said kink. I said change in direction.
5 Remember it was from at least 20 degrees to 15 degrees.
6 So it's a noticeable change in direction. We went with
7 the term "angular offset" because it's a phrase that
8 Crown used to describe that structure. They're not
9 bound because they used it in that case. They're bound
10 because it's in their invention. There must be a border
11 there.

12 Your Honor can make this case so much more
13 clean if your Honor construes this the way the invention
14 is and the way Crown presented it all the way through so
15 that the experts can't come up with many, many, many,
16 many of these that give you many, many, many lines with
17 many, many, many, many angles when we have to say is the
18 angle greater to, equal to or less than what's in the
19 claim so you can only have one angle instead of an
20 infinite number of them.

21 Finally, on the two chuck walls. I don't
22 hear Crown other than preserving appeal rights
23 substantively seriously telling you that the chuck
24 wall -- the chuck doesn't have two distinct and
25 discernibly side surfaces. That much I think is --

1 while they were reserving the right to fall back on
2 appeal purposes to what they said in the first *Markman*,
3 I don't think they're seriously advancing a reason why
4 you shouldn't do that again. The most -- we then differ
5 on how you describe the two chuck walls, the two walls
6 of the chuck when they are individually called out.
7 I'll stand with what I said this morning on the upper
8 one being substantially cylindrical.

9 The bottom one does need clarification.
10 That is the frustoconical drive surface. I suppose you
11 could put that in the can end language. Your Honor
12 unequivocally found in this case that this invention,
13 not one embodiment, this invention requires the bottom
14 of the chuck to drive a can end wall. Crown appealed
15 and the federal circuit said that it was a step too far
16 to say that there must be a negative limitation. Thou
17 shalt not also drive in the reinforcing bead.

18 So if we drive in both places, we can still
19 be covered. It doesn't negate that the invention drives
20 on the can end wall. It's not just in the
21 specification. That's the magic of their seaming method
22 that they sold to the patent office to get this patent
23 issued.

24 So again, your Honor, we would put it in the
25 description of the lower wall of the chuck. It could

1 also be in the description of the lower wall of the can
2 end. In fact I think we put it in both places to be
3 clear. But there has to be driving there.

4 Finally, your Honor, I apologize I'm doing
5 my second finally. The 20-degree angle. Mr. Heist went
6 on at great length with springback and arguments from
7 our appellate brief. While I stand by what's in the
8 brief on that and the mathematical example does work
9 out, the 20 degrees does not come from the springback.
10 The 20 degrees comes because your Honor found that the
11 disclaimer said at least ten degrees of bending in the
12 process of moving and it must become substantially
13 cylindrical, which raises the question of: What does it
14 need to become substantially cylindrical?

15 That means it wasn't in the first place.
16 The line of demarcation here is 20 degrees. There's
17 nothing in the patent or in any file history that even
18 remotely suggests that they ever had anything covered by
19 the patent that was less than 20 degrees, and the
20 specification repeatedly describes the can end wall of
21 the prior art as being 20 degrees or less.

22 So in order to implement the disclaimer that
23 you already found specifically to become a substantially
24 cylindrical part that Crown has never taken issue, even
25 on appeal, the 20 degrees is the way to do that. It

1 flows directly from the consistent description of the
2 invention. There's no way they should be able to claim
3 an upper can end wall that's in the prior art range and
4 still say that it's becoming substantially cylindrical
5 as their disclaimer. With that, thank you, judge.

6 THE COURT: Thank you, Mr. Luken. Thank you
7 Mr. Heist, Mr. Murphy, for your courtesies.

8 I'm assuming that you will either now or at
9 some point need a transcript, is that correct, Mr.
10 Luken?

11 MR. LUKEN: I think so, judge, yes.

12 THE COURT: Mr. Heist?

13 MR. HEIST: Yes, your Honor.

14 THE COURT: While I am in a position of
15 finding it hard to conceive what more you can write that
16 you haven't already written or said, I would be remiss
17 if I didn't give you at least the opportunity to tell me
18 whether you wish any post-argument briefing. Mr. Luken.

19 MR. LUKEN: Your Honor, as I said briefly
20 before, I think last time your Honor allowed two rounds.
21 As Mr. Heist pointed out, that may have been a little
22 bit, a lot. I would suggest something relatively soon
23 so it doesn't hold up your Honor's decision. Maybe 10
24 days, two weeks after a transcript. The briefing so far
25 was 40 in the opening and 30 in the response. I would

1 propose something like 20 or 25 pages, something that's
2 shorter than what we've already done. So basically we
3 can look at -- we're going to get each other's
4 PowerPoints. We can take a look at those and if there's
5 a here, there, there, that we need to correct, that was
6 hard to do on the fly, it can be fairly tight, fairly
7 quick. That's what I would propose.

8 THE COURT: Mr. Heist, your thoughts.

9 MR. HEIST: Your Honor, I'd be happy to rest
10 on the existing briefing. If Mr. Luken wants to file a
11 brief, maybe we'd respond to it. I don't feel that we
12 need to say anything further than we already have. In
13 our view actually, market procedure in the last case was
14 sufficient. We don't think we should even be here
15 today.

16 THE COURT: All right, sir. Mr. Luken.

17 MR. LUKEN: Your Honor, I polled our group.
18 If your Honor -- judging from your comment about you're
19 not really sure what we can say, I think we're both
20 going to give you our PowerPoints. We're also okay
21 resting on it if your Honor doesn't desire anything
22 further which it sounds like you don't.

23 THE COURT: I'm not saying I don't desire
24 anything further. I was simply indicating some question
25 as to what more could be said. But again, this is not

1 my case. This is counsel's case. Mr. Luken.

2 MR. LUKEN: Your Honor, I may have been a
3 little flip in the way I characterized it.

4 THE COURT: I don't feel that.

5 MR. LUKEN: We are comfortable leaving it as
6 it is.

7 THE COURT: Why don't we do this then. I
8 will ask our court reporter to generate a transcript as
9 quickly as she can. In the scheduling order I filed
10 yesterday, I talked about a decision by December 23rd.
11 I will do my very, very best to meet that. If I can't,
12 I'll simply extend dates by the amount of time I've gone
13 past that date.

14 Mr. Luken, anything further?

15 MR. LUKEN: That answered the question I was
16 about to ask, judge, because you put a certain date or
17 so many days afterwards, so that clarifies it.

18 THE COURT: Fair enough. Mr. Heist,
19 anything?

20 MR. HEIST: Nothing, your Honor, I guess we
21 would like to hand up our PowerPoint if you would like
22 to receive it.

23 THE COURT: Absolutely. I think that would
24 be extremely helpful. May I suggest that if there is
25 nothing further that we adjourn and I'll let you give

1 that to Cindy. To the extent it's necessary, why don't
2 I simply admit this as a Plaintiff's Exhibit 1 and a
3 Defendant's Exhibit 1.

4 Mr. Heist, anything further?

5 MR. HEIST: Nothing from us, your Honor,
6 thank you.

7 THE COURT: Mr. Luken?

8 MR. LUKEN: Nothing, judge.

9 THE COURT: Again, thank you for the quality
10 of your presentations and your courtesies. We are in
11 recess.

12 (Proceedings concluded at 2:43 p.m.)

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I, Debra Lynn Futrell, Notary Public in and
for the State of Ohio at large,

Do Hereby Certify that the foregoing pages
are a true and correct transcription of my stenographic
notes taken of the proceedings held in the
afore-captioned matter, to the best of my ability.

S/Debra Lynn Futrell

Debra Lynn Futrell, RMR-CRR
Notary Public, State of Ohio
My Commission Expires 12-27-13